

NEW HAMPSHIRE STATE BUILDING CODE REVIEW BOARD

Minutes of Special Meeting

Hearing on Docket # SBC – 01 – 04

June 21, 2004

Attendance:

Robert Clegg, Chairman, Department of Safety

Tyler Carlisle, Board of Engineers, licensed electrical engineer

Jerry Tepe, Board of Architects, licensed architect

John Tuttle, NH Home Builders Association, Architectural designer – residential

Mark Weissflog, NH Electrical Contractors Business Assoc., licensed master electrician

Wes Golomb, State energy conservation code office

Rick Swain, NH Plumbing & Mechanical Contractors Assoc., mechanical contractor, business

Thomas S Lambert, Chief, NH Association of Fire Chiefs, Municipal Fire

Michael Santa, CBO, Governor's Commission on Disability, Architectural barrier/free design

Medard Kopczynski, NH Municipal Association

Kenneth Andrews, NH Building Officials Association, municipal building official

Joel Fisher, Board of Engineers, licensed structural engineer

George Maihos, NH Electricians Board, licenses master electrician

James Petersen, PE, Board of Engineers, licensed mechanical engineer

Tedd Evans, Board for licensing and regulation of plumbers, licensed master plumber

Absent/Excused:

Bruce Phillips, NH Association of Fire Chiefs, municipal volunteer fire chief

Fred Baybutt, Associated General Contractors, building contractor – non-residential buildings

Guests:

Marta Modigliani, Attorney, Department of Safety, Office of the Commissioner

J. William Degnan, Acting State Fire Marshal

Thomas Johnson, Director of Zoning and Building Codes, Town of Durham, NH

Attorney Bobbie Hants, for Fischer Properties

Ron O'Keefe, Fire Chief, Town of Durham, NH

Mark Tetreault, Fire Marshal, Town of Durham, NH

PUBLIC HEARING:

Chairman Clegg: We have a Call To Order. Reminder to everyone that this hearing is being taped. Please keep comments in sync. Also, speak clearly, try not to ruffle a lot of papers in front of the microphone, it makes it difficult to transcribe. And I will open the Hearing and start with Bill Degnan. I am assuming that you are representing the Fire Marshal's Office.

Bill Degnan: Yes I am. Thank you Senator Clegg. For the record, my name is Bill Degnan, D E G N A N , Acting State Fire Marshal. Today I am here to present the case in regards to the State Fire Marshal's Office review for the consideration of a number of duplexes in the Town of Durham as they were classified as rooming and lodging, rooming and lodging section of the Code. The . . . specifically the item in question is the Walter Fischer Properties in Durham. They are unprotected wood framed dwellings. They are duplex style, and they were originally constructed as a two family unit back in the 1960's. This Office received correspondence back in October of 2003 from Attorney Barbara Hantz who represented Walter Fischer Properties. And she was questioning the Young Drive properties as rooming and lodging, pursuant to the NFPA 101 Life Safety Code, 2000 Edition, Chapter 26 as adopted by the State Fire Code.

I contacted her on November 10, and advised that a variance request would be the first step of the process. And that . . . because she was requesting a hearing, and so . . . we started that dialogue in regards to the variance. And, if a hearing was to be conducted, it would come before this Board and not before the Fire Marshal. She requested at that time that I put the request on hold, and she was trying to negotiate with the fire department in the Town of Durham. On January 30, 2004, I received a request via the telephone message from Attorney Hantz, requesting a variance. And on February 2, 2004, I spoke with her and agreed to assess and reply in the form of a variance request. Our assessment of the buildings over there, was that it . . . it did fall into the rooming and lodging section of the Code, and that the decision the Durham Fire Department had made was correct in their application of this.

There is some concern in regards to . . . I think confusion between the provisions of the Life Safety Code and the provisions of zoning. So . . . today as witnesses on behalf of the State and . . . and the Town of Durham, I would like to bring forward that Thomas Johnson, he is the Director of Zoning and Building Codes for the Town of Durham, in order to set the stage in regards to how these buildings fit into the Town of Durham.

Chairman Clegg: Why don't you grab another chair. George . .

Bill Degnan: Would you please state your name for the record?

Thomas Johnson: I am Thomas Johnson, the Director of Zoning and Building Codes, and Health Officer for the Town of Durham.

Bill Degnan: Mr. Johnson, how long have you been employed by the Town of Durham.

Thomas Johnson: I started with Durham in October of 2001.

Bill Degnan: And, as part of your duties, do you review the items in question with regards to zoning and building codes for the properties that are in question in Durham?

Thomas Johnson: Yes I do.

Bill Degnan: How did you first become involved in this?

Thomas Johnson: There was . . . I believe it was in 2002, there was a fire in one of the units, and that was my first involvement with this particular street, these 9 properties, and as part of the renovation for the fire rehab they . . . the applicant . . . the property owner came in for building permits. I was also on scene with the Fire Marshal as part of the investigation for the fire. And then we had the property _____ necessary permits to render it and bring the buildings back into compliance for the use of certificate of occupancy.

Bill Degnan: And did that review of the building codes do an assessment of these building in regards to whether there is an (effective time)?

Thomas Johnson: Yes. As part of that building permit review I initially questioned the . . . the amount of occupants in the building which led us directly to a Supreme Court decision that Fischer Properties had available . . . for instance, the . . . concerning the number of occupants permitted in that Supreme Court decision allowed them to have 4 to 6 in spite of the local zoning and the habitable floor area in the building.

Bill Degnan: Was that Supreme Court decision, specific to life safety, or zoning issues?

Thomas Johnson: I believe there was 4 or 5 points in the decision, and the point that they failed on is the fact that they were grand-fathered in and permitted to have 4 to 6 per the zoning provisions, they were grand-fathered strictly on zoning.

Bill Degnan: Thank you. I have no further questions.

Thomas Johnson: Thank you.

Bill Degnan: At this time, I would like to call Durham Fire Marshal, Mark Tetreault. Fire Marshal Tetreault would you state your name and spell it for the record please.

Mark Tetreault: Its Mark Tetreault, T as in Tom, E T R E A U L T.

Bill Degnan: And who are you employed by?

Mark Tetreault: The Town of Durham Fire Department.

Bill Degnan: Mark, could you explain to the Board, your first involvement with these buildings following the fire in 2002?

Mark Tetreault: Well, the Code Enforcement Officer and I did some dialogue about the occupancy of the building, and it appeared as though, at the fire, that there were more than . . . there were probably 6 people living in that duplex style building, and doing some research, we found that that was actually the case and was pretty common in the . . . the development. And we did some research into the Supreme Court decision, and I was able to ascertain that that grand-fathering was a zoning issue although it did not specifically state anything about the Fire Code. And I then looked into the Fire Code, and there is no grand-fathering provision in the Fire Code. Tim and I determined that these buildings would need to meet the Code as far as existing lodging and rooming houses. Which meant several fire safety upgrades to the building. I then notified the owner of such.

Bill Degnan: Mark, is the existing section of the Life Safety Code, those provisions, is that considered grand-fathering in regards to it gives the property owner some leniency.

Mark Tetreault: It does. If we classified them as new lodging and rooming houses, then it would require a sprinkler system and some other things, where the . . . as an existing lodging and rooming house we would require fire alarms and some closures and additional smoke detection.

Bill Degnan: From your review of the building post fire, what were some of the items that you did notice that were in violation of the existing section of Code?

Mark Tetreault: Well there were no self-closing hardware on the room doors which allowed the fire and smoke to spread throughout the 3rd and 2nd floor of the building. There were smoke detectors on each level of the building, of the occupancy, all except one had been disconnected by the occupants. There were . . . there were 2 people kind of living in the room where the fire occurred and lots of storage of . . . stuff, combustibles which contributed to the fire – fire (Code?).

Bill Degnan: Typical students room . . .

Mark Tetreault: Yes, typical college student-type occupancy.

Bill Degnan: Thank you. I have no further questions.

Chairman Clegg: Hold on, before you leave, Attorney Hantz, I was remiss in not asking if you wanted to cross-examine. Would you care to cross-examine this witness at this point?

Attorney Hantz: I can either save my questions, or I can do it now, depending on how you want it.

Chairman Clegg: I will give you the option.

Attorney Hantz: Ok. I will ask a couple of questions.

Chairman Clegg: Would you identify yourself for the record please,

Attorney Hantz: Attorney Hantz.

Chairman Clegg: . . .and could you move forward with your . . . if you don't mind, so that the recorder can pick up some . . . thank you.

Attorney Hantz: Bobbie Hantz. I am here representing Walter Fischer and the properties at issue. The smoke detectors were, you spoke of some smoke detectors, there existing in the building.

Mark Tetreault: Yes. There is one on each level of . . . of each side of the properties.

Attorney Hantz: And those are required for the duplex use of the house.

Mark Tetreault: Yes.

Attorney Hantz: And they are installed?

Mark Tetreault: At the time of the fire, all but one of them had been removed. But, subsequent . . .

Attorney Hantz: Removed or disconnected?

Mark Tetreault: Disconnected for a better term.

Attorney Hantz: Do you know if all of the units have the same number of occupants? Did your investigation . . .

Mark Tetreault: I do not. I reviewed the Supreme Court Decision which allowed up to 6 occupants per side.

Attorney Hantz: That's all for now.

Chairman Clegg: Thank you. Attorney Hantz, would you like to cross-examine the witness, Mr. Johnson at this time or would you like to wait?

Attorney Hantz: I only had one question for Mr. Johnson. Mr. Fischer obtained a building permit for the renovations?

Tom Johnson: Yes, he did.

Attorney Hantz: And he obtained a certificate of occupancy at that time?

Tom Johnson: Yes, he did.

Chairman Clegg: Thank you sir.

Bill Degnan: At this time, I would like to call Durham Fire Chief Ron O'Keefe.

Chairman Clegg: Mr. O'Keefe, can you identify yourself for the record.

Ron O'Keefe: Ronald T. O ' K E E F E and I am the Fire Chief for the Town of Durham. Have been the Fire Chief since 1998.

Bill Degnan: Chief O'Keefe, following the fire in 2002 what was your involvement with the buildings?

Ron O'Keefe: At the time of the fire, I was on vacation, and was given a notification call per our policy, and that we had a fire, it was close to being a fatal, person had just escaped. When I came back from vacation I met with the Fire Marshal looked up the investigation to see what was going on, and we started to uncover the issues of the numbers of people in there.

Bill Degnan: And, so in the process of covering the policies in regards to the number of people, does that take an extended period of time?

Ron O'Keefe: Yes it does. Its . . . with anything else, there is a lot of things going on a lot of inspections, a lot of other duties, so I try to get connected with all parties, and coordinate with the Code official. Takes some time.

Bill Degnan: In regards to existing buildings, has there been any negotiations in regards to alternatives for fire protection in these buildings?

Ron O'Keefe: We have had some on-going discussions with Mr. Fischer and his legal representation.

Bill Degnan: Were there any alternative's that would have required that would have required a form of variance, that were discussed?

Ron O'Keefe: Not that I am aware of. We had talked, I had talked to the town administrator. It was an issue of water supply for a fire sprinkler system for the building, but we have since come up with an alternative that would not require it.

Bill Degnan: No further questions.

Chairman Clegg: Attorney Hantz?

Attorney Hantz: When were the provisions of this . . . of the Life Safety Code and Fire Protection Code, adopted?

Ron O'Keefe: Well with the provision at the time of the fire had been adopted the year 2000. Since then we have adopted the newer version of the Code.

Attorney Hantz: Was the 2000 adoption, the first time the Town had adopted these . . . Life Safety Code and Fire Protection Code?

Ron O'Keefe: No. We . . . I can't tell you exactly how many times we've adopted. They've been in place since I have been in Durham since 1989 and I know prior to that.

Attorney Hantz: Is that 1989? Or 1999.

Ron O'Keefe: I came here in 1989, I was promoted to Fire Chief in 1999.

Attorney Hantz: Would it make a difference, in your analyses if there were four (4) people per duplex unit?

Ron O'Keefe: Well, the Code would put . . . the Life Safety Code is four (4) in one so, if it was guaranteed that they couldn't have more than four (4) that may have a difference.

Attorney Hantz: The definition of a single family . . . in one place in the Code . . . is one person renting to no more than three (3) outsiders. Is that correct?

Ron O'Keefe: I don't believe that's correct. I think in this case, the definition of a family is you can have up to 3 unrelated within like . . . the family. The family is defined as a family member.

Attorney Hantz: That's all I have.

Chairman Clegg: Thank you. Do you have any questions for members of the Board of Fire Marshal Degnan before we do business. Jerry Tepe.

Jerry Tepe: Mr. Degnan, Jerry Tepe. Just one quick question. You are . . . you're . . . I don't want to say citation . . . but, you're Code that you are referencing in this is the NFPA 101 Life Safety Code? You are not referencing NFPA 1 Fire Prevention Code?

Bill Degnan: Yea. You are correct. The NFPA Life Safety Code, 101.

Jerry Tepe: Thank you.

Chairman Clegg: Are there any other questions? Seeing none, thank you Sir.

Bill Degnan: I would just like to close with something you might . . .

Chairman Clegg: You'll get an opportunity to do that later.

Bill Degnan: Ok.

Chairman Clegg: Attorney Hantz.

Attorney Hantz: I'll just take you briefly through the material that we submitted. And essentially the issue here from Mr. Fischer's perspective is the retro-active application of this Code, it was not in place when these buildings were constructed. Since that time, the units have been classified by all the regulatory authorities as duplex units, 2-family units. They have been maintained in accordance with the requirements that are applicable to 2-family units. They have maintained Code compliance with 2-family units, and then all of a sudden, 30 years after the buildings were constructed, they are now being reclassified as rooming houses and the request has been made for substantial structural modifications which in our opinion, interfere with the use of the property as it has been used. Self closing hardware, higher rated walls, starts to compartmentalize a space which is laid out as a typical duplex unit.

So we have two (2) issues essentially, the retro-active application of a new regulation, and that is the same, whether it's a zoning regulation or a life safety regulation. The Life Safety Code does consider new uses versus existing uses in an attempt to recognize property owners rights. Its a little more lax when it comes to existing uses imposing requirements on uses that are already pre-existing. That's not even what we have here. That would be the case if the Code were being applied as a duplex use to these existing duplex uses. What's happening here is a new classification is being super-imposed for an old use. And that's the difficulty and that's what we believe, the Constitution would prohibit, because its a retroactive application. And the regulation for pre-existing use which essentially changes that use. And that's where, we believe, this isn't a case of . . of applying an existing regulation to pre-existing use there's been no change. And I think the Code itself, recognizes that there may well be classifications which should be observed. It talks about . . . uses aren't allowed to be changed from one classification to another. That's in the Code and you've cited it, and I think the Code recognizes that you just can't just change a classification in order to bring something into a different set of regulations. These buildings were built 30 years ago as duplexes and have been used that way and nothing has changed. The owner hasn't changed the use. The Supreme Court Opinion which was issued in the 70's, confirmed that they may be rented to 'up to 6 people' at that time the Town of Durham was limiting 'unrelated' households to a total of 4 people. Since been reduced further by the town to 3 'unrelated' people. But at that time, the Supreme Court said, here are some duplexes that have been rented to 6 people, square footage allowed for that, and the Supreme

Courts' Opinion was that you couldn't change that after the fact, to take away the owners use. And again, I think we have the same situation here.

You have the information that came from the town to Mr. Fischer, and his responses. I have included the Supreme Court Opinion which essentially talks about the owners property rights, and how they can't be effected and altered after the fact. You have the assessors cards, and I included those, just so you can get an idea of what these structures look like. They are typical, standard, 2-family units. Bedrooms upstairs, living area on the first floors. That's the way they were built, that's the way they have been classified by the town, that's the way they've been accessed and frankly that's what the zoning allows for in this district. It doesn't allow for a rooming house use. So you've got a landowner who has complied with the existing regulations all the way along.

Certain excerpts from the Fire Protection Code and the Life Safety Code which are inter-dependent. It talks about buildings in existence are permitted. This is 1-5.5 . Buildings in existence who were permitted for construction prior to the adoption of the Code, shall comply with the provisions stated herein for referenced for existing buildings. And from where we sit, that means what is related to existing 2-family uses. Not a change to a rooming house. That these were existing 2-family uses. Obviously, additions, alterations or repairs have to conform to new building standards, again, for a 2-family use. And I think the Code is very clear in trying to not intrude upon the pre-existing use issue. Existing buildings at 1-9.2, Existing Buildings that are occupied at the time of the adoption of the Code shall remain in use. I think the drafters of the Code were very well aware that you can't super impose a new Code on old buildings without impacting the property rights. Provided that the following conditions are met. The occupancy classification remains the same, there has been no change here. And there exists no condition being hazardous to life or property that would constitute an imminent danger. These duplexes have existed. There was the one fire incident in 30 years, which took place. But there has been no evidence that the existing fire protection system and certainly when the Fire Marshal has inspected he notes deficiencies on his periodic inspections, and those are corrected, so they use the same fire protection divisions in those units are sufficient. If there were a change of occupancy, we would agree, that might bring it into a different classification, but here there has been no change.

The lodging and rooming house definition, at 2-1.96, talks about buildings that do not qualify as 2-family dwellings, yet provides sleeping accommodations for up to sixteen (16) people. We would submit that this qualifies as a 2-family dwelling and not a rooming house. And certainly, I think the most important thing to note is that in the appendix to the Life Safety Code, its Chapter 24, the Code talks about the fact that the definition of a dwelling unit or a family, defers to local law. The Code doesn't necessarily define a family. It defers to the local rules and regulations or law. Here we would submit the Supreme Court Opinion established what the occupancy for this unit is and so the Code can't

countermand that. The Supreme Court determines 6 people are permitted in this 2-family dwelling. So we would say that the Code has to defer to that finding.

There are also specific examples of an individual or couple who rent a house and then sub-lease space for up to 3 people, to be considered as a single family unit. A family, 2-3 people, sub-leasing to 3 unrelated folks, could be 6, 7, 8 people. That's not what we have here. What you have in your packet is a sample lease. The one we used had 5 tenants, and these . . . Mr. Fischer can attest that these units are occupied by 4 to 6 people, there aren't 6 in every unit. This particular lease that you have is 5, you will see it is a year long lease. These folks sign up together. They are committed together to the lease. And they are there for the year, not unlike any other rental situation. Its not where you have one person renting and subletting to bunch of other folks as you might in a rooming house. This is a group who are responsible jointly for the property, for the maintenance of the property and for the expenses.

If you turn back, we have the building fire inspection reports on these properties, as recently as May 2002, where the Town of Durham classified them as 2-family dwellings, and inspected them under those sets of criteria, indicated deficiencies which were attended to by the landlord. So again, this just goes to show that for 35 years, these properties have been run, looked at, and regulated as 2-family dwellings. I have included some of the Town of Durham's zoning ordinance provisions, knowing that they're different from the Life Safety Codes. But just to show that rooming house uses are not permitted in this district, and that single-family and duplex occupancy is limited by the Town of Durham, however, not applicable to these particular grand-fathered units.

I have included a map so that you can get a sense of this area. They're are 9 duplex units on 9 of these lots, not all the lots were built on at the time. It is a town road with some access from the main road. And then in the back for your consideration, and it is a . . . an issue in flux, back when the Supreme Court Opinion was rendered in the 1970's the basis for the distinction between related and unrelated folks having different regulations apply to them, was based on this theory that a family might look out for other family members, when unrelated people might not. Not that it's something for this Board to determine, but it does raise a question as to whether that continues true today, or you have different types of blended families living arrangements and you begin to wonder about the under-pinnings of the decision that a family is going to take better care of itself than a voluntary group getting together of friends to rent a unit. I can have Mr. Fischer up here to give you a little more background on the properties if that is helpful. Or if we can answer questions.

Chairman Clegg: Med Kopczynski.

Med Kopczynski: Yea. I have two . . . two questions. You started speaking of two issues, but I only really heard one articulated. And this is related to the

retroactive enforcement of the Code. That's the only issue I clearly heard. Was there a second issue?

Attorney Hantz: Under the same umbrella the retroactive application of the Code itself, and then I believe, the provisions within the Code sort of prevent the retroactive applications. So two parts. One is you have a Code adopted in the year 2000 being applied to property that was built in the 60's. First issues. But within the Code, I think the Code takes pains to leave preexisting uses alone, or to take care of them to avoid the problems. So I think the terms of the Code itself, prevents this sort of change in classification.

Med Kopczynski: Second issue. And its just for clarification.

Attorney Hantz: Yep.

Med Kopczynski: You mentioned that the term of the lease is a year, but yet there appears to be about a 10-day gap in the term. Was that for cleaning? Or something like that?

Attorney Hantz: Turn-over.

Med Kopczynski: Turn-over. So there's about 10-days where its not in use.

Attorney Hantz: That would be correct.

Med Kopczynski: Thank you.

Chairman Clegg: Ken Andrews.

Ken Andrews: A simple question. Where does the owner of the property reside?

Attorney Hantz: Dover, NH

Ken Andrews: Thank you.

Chairman Clegg: Tyler Carlisle

Attorney Hantz: Actually the office is in Dover, he resides in Wolfeboro.

Tyler Carlisle: Attorney I . . . a quick question . . . you said that . . . yet I think I understood . . . you said that they are trying to be reclassified as rooming houses, and I thought I understood that you said that rooming houses are not allowed in this area. Does that mean that they would have to close down then, if they . . .

Attorney Hantz: That is a good question. The Town of Durham went to the zoning board because when this classification issue came up it was confirmed by the

zoning administrator. We went to the Zoning Board to say we have a potential problem. The Zoning Board said 'we' really don't have jurisdiction to talk to you right now as, far as we are concerned, you're duplexes, so we didn't get a decision out of the Zoning Board. I have had the experience in another town, not Durham, where property was reclassified based on a septic design. And the issue was whether they were cottages or motels units and that did cause zoning problems, because DES classified these units as motel units and then the town determined that they weren't allowed, even though it has been a preexisting cottage use in that particular area. So that is one of our concerns.

Tyler Carlisle: I have two other questions . . . one is . . . you mentioned that Mr. Fischer has 9 of these dwelling units, 9 duplexes I guess.

Attorney Hantz: 9 duplexes.

Tyler Carlisle: Do you know how many in the Town of Durham that are used such as . . similar types of things? In the Town . . do you have any numbers on that?

Attorney Hantz: Tom may know, I don't believe there are any other grand-fathered duplex units. At the same time period as Mr. Fischer's. There may be duplex units . . . the Town has had 2 different limits on occupancy, first it went to four (4) and then it went to three (3). And so there may be other duplex units that are grand-fathered from those changes, I am not aware of others that allow up to six (6). But, the Town may have information on that.

Tyler Carlisle: That's it. Ok.

Chairman Clegg: Jerry Tepe.

Jerry Tepe: Two separate unrelated questions. One is the follow-up to what I asked the Fire Marshal.. You are citing Sections of NFPA 1 – the Fire Prevention Code, and I believe you said in your testimony, something like they are inter-related or words to that effect.

Attorney Hantz: Um-hum (indicating affirmative)

Jerry Tepe: Can you expound upon that a little bit more. Why you think the Fire Prevention Code is relevant to this case?

Attorney Hantz: Only because in my reading, the Life Safety Code refers to the Fire Prevention Code, and vice versa for definitions. I can't point you to specific spots . . . I can read thru, but when I was reading, I ordered both things . . . manuals and they do seem to cross reference in terms of definitions. So I have an abundance of caution in the booklet.

Jerry Tepe: Second question. When the rent, if you call it rent, is paid on these leases, are they paid in one check or are they paid in four to six checks?

Attorney Hantz: It would depend. How the tenants . . . pay the rent. . . they need to pay their rent in installments . . .

Jerry Tepe: Right

Attorney Hantz: And so, frankly, it just depends . . . whether it comes from one tenant or several.

Jerry Tepe: Ok. Thank you.

Attorney Hantz: Yeup. Or parents.

Chairman Clegg: Any other questions in house? Is there anyone here that has questions of any of the previous witnesses? Hold on. Attorney Hantz . . . if you would step back for a moment . . .

Attorney Hantz: Sure.

Chairman Clegg: . . . and then . . . Mike Santa you have a question of a particular witness?

Mike Santa: Yes. I would like to ask a question of the Fire Marshal.

Chairman Clegg: Durham Fire Marshal?

Mike Santa: Durham Fire Marshal, I am sorry.

Chairman Clegg: Identify yourself again for the record.

Mark Tetreault: Mark Tetreault.

Mike Santa: I see two letters in here any maybe I am just reading them incorrectly, but one letter I think, was in October and another one was in January . . . and one talks about requiring a sprinkler system in the building, and the other one does not. And what is . . . I'm confused . . . what is the current requirement now from your Department.

Mark Tetreault: The sprinkler system is not required. A sprinkler system was discussed as a possible alternative. If you install a residential sprinkler system that is . . . the Code gives substantial lee-way in not having to do a lot of other construction in the building and maintaining self-closing hardware on the doors, not putting smoke detectors in every bedroom. So that was an option that was discussed, but not required. If we were classifying it as a new occupancy, the sprinkler system would be required.

Mike Santa: Ok. Thank you.

Chairman Clegg: Med Kopczynski

Med Kopczynski: This could either be for the Fire Marshal or for Mr. Fischer.

Chairman Clegg: Let's hold off for a minute. Are there anymore . . . anyone else have a question of this witness? Tyler Carlisle.

Tyler Carlisle: I'm curious, and maybe you can fill me in. I am concerned that I think that in my reading here I see a family could be a family of one and it can be 3 additional people like they have in the building with them. Is that . . . am I correct in that? Would that be the case?

Mark Tetreault: Yes.

Tyler Carlisle: So that if each of these areas had no more than four people in it, then everything would be still ok?

Mark Tetreault: Yes, I believe so.

Tyler Carlisle: So its only because they are going to two additional people, or one more additional person other than the four?

Mark Tetreault: Yes.

Tyler Carlisle: Ok. Thank you very much.

Chairman Clegg: Wes Golomb.

Wes Golomb: If a family of 6 had bought this house 30 years ago and still lived there . . . would it be out of Code?

Mark Tetreault: Yes. The Code takes into consideration the life style and the hazards associated with the occupancy. So a single family is a single family, regardless of the number of children or . . . whatnot.

Wes Golomb: But would be out of Code now. It would not have been in . . . it would not long be legal for this family to live there?

Mark Tetreault: No it would be legal.

Wes Golomb: So there's nothing . . .

Mark Tetreault: It is still a single family.

Wes Golomb: Ok. And, could you please outline, maybe I don't know enough about it, but what specifically are the public safety issues here that would be different if this were re-classified?

Mark Tetreault: I am not sure I am following your question. What safety upgrades would be required? Is that . . .

Wes Golomb: Why I have heard some of them, but I'd like a . . . I would like to get more of a feeling about the public safety issues and the change from one to another. How would that . . . what order of magnitude safer would this be? I am not sure exactly how to ask this question. I am sorry.

Mark Tetreault: Well, because the people are not related, they have no vested interest in one another, other than they're . . . they may be friends, the Code has made some additional requirements to make sure each individual is safe as opposed to a single family where they are probably going to be looking out for one another, making . . . being aware because there is comings and goings and whatnot. So that . . . what the Code has said is that there has to be smoke detectors in every bedroom because often times in the larger rooming house, the doors are . . . its a private area . . . the steel, its closed off. It requires that they be self-closing hardware on the door, so that if a fire in one room has . . . it gives the people time to escape from the building, because the doors close by themselves. It requires separation of vertical opening. At this point we have three levels that are, for all intensive purposes, open so a fire in the basement would extend to the third floor rather quickly, the second floor rather quickly. It requires egress windows in each of the bedrooms.

Wes Golomb: So you are asking them to change the windows as well? The size of the windows?

Mark Tetreault: Some of the houses have adequately sized windows and some of them do not.

Wes Golomb: Would there have been a materially different outcome to this fire if the Code had been maybe . . . that's suggestive and you can't answer it.

Mark Tetreault: It is subjective.

Wes Golomb: In your opinion.

Mark Tetreault: In my opinion, it would have because of the self- closing would have closed. And limited the fire spread, and smoke spread. There would have been more smoke detectors, and we don't know if the tenants would have disconnected more smoke detectors. But there definitely would have been more smoke detectors in each room . . . increasing the chances that one of them would have gone off. We were very lucky in that the one smoke detector they left connected went off and alerted the occupants to evacuate the building.

Wes Golomb: Thank you.

Chairman Clegg: Ken Andrews.

Ken Andrews: Fire Marshal Tetreault, how long have you been employed as the Fire Marshal for the Town of Durham.

Mark Tetreault: Approximately 3 years as the Fire Marshal.

Ken Andrews: In that 3 years, have you always used the same edition of Life Safety 101? Or was there more than 1 edition.

Mark Tetreault: There was more than 1 edition.

Ken Andrews: How many more?

Mark Tetreault: I'm thinking just two . . . but I . . . I . . . that's not positive, off the top of my head . . . I am not sure exactly, but I think its two.

Ken Andrews: A follow-up question. Does the Town of Durham formally adopt these Codes, or do they go through the adoption process as entailed through the Fire Marshal's Office in Concord?

Mark Tetreault: As a matter of course, we do adopt the Codes. Generally, our enforcement is reinforced through the State, but we do adopt the Codes locally.

Ken Andrews: Thank you.

Mark Tetreault: Yes sir.

James Petersen: Does the Supreme Court case that's been referenced grand-father the buildings with respect to fire protection issues?

Mark Tetreault: Well, I'll . . . I'll try and answer that. Perhaps the better person to answer that would be the Zoning . . . Building Administrator. But my understanding is that the Supreme Court Decision was specific to the zoning. Apparently the Town wanted to retroactively enforce the newer edition of the zoning law. And the Supreme Court said you can't enforce . . . retroactive . . . retroactively enforce zoning, and the zoning is what was grand-fathered in the Supreme Court Decision. It did not mention the fire protection ability.

Chairman Clegg: John Tuttle.

John Tuttle: I have a question to piggy-back on Ken Andrews . . . in the possible two different Life Safety Codes that were adopted, how has the definition of a duplex changed?

Mark Tetreault: I don't believe it has.

John Tuttle: Thank you.

Chairman Clegg: Any other questions? Tedd Evans.

Tedd Evans: It was mentioned that there has only been one fire in these 9 buildings in their existence. Do you know if other incidents that have taken place since then?

Mark Tetreault: I know we have had several minor fires in the buildings since I have been in Durham which is . . . its been since 1996. We do routinely have outside fires in the building. And outside fires in the neighborhood.

Tedd Evans: (inaudible) In your opinion, does the nature of the rentals of these buildings offer more . . . incidents than buildings that may be rented in a more typical family arrangement? Same classification usage assumed.

Mark Tetreault: I believe they do. We're finding that . . . that off campus . . . so our student housing in general, is a under-reported high-risk group who have . . . have in the past . . . consumed mind altering substances such as alcohol, they may be less able . . . more likely to start a fire because they . . . if you are under the influence of a . . . of a substance like alcohol, you more likely to start a fire. And then they are finding that because a fire was started, they are less able to escape. In these buildings we routinely will go there on a Thursday, Friday or Saturday night and have huge parties in the basements, and on the upper floors of the buildings so, we've broken up parties there with over a hundred people in the basements with the same egress which is, I think, substantially different than you would find in a known single family home.

Joel Fisher: I believe this question was asked of the Attorney, do you know how many buildings there are in your jurisdiction that are occupied in a similar fashion regardless of whether or not they are classified as 2-family or single-family? How many buildings there are that house similar . . .

Mark Tetreault: I truly wish I did. And this . . . this has been a priority of ours to identify buildings that may be over occupied. Ask me to identify them? We enforce the Code uniformly. We did have a similar situation where a single family home was occupied by I believe 8 college students. And because that never went through an official change of use to a lodging and rooming house, we applied the Code as new lodging and rooming and required a sprinkler system in that building. And now, we have a fully sprinklered lodging and rooming house. As we identify them, we try and enforce the Code. The problem is identifying . . . and that often involves some detective work looking . . . you know . . . are there 15 . . . are there 5 cars out in front of the house that could indicate that it is being over-occupied. Is there is a large amount of trash there on trash day? So we are making a concerted effort to identify them and enforce the Code uniformly.

Chairman Clegg: Thank you. Med.

Med Kopczynski: Mr. Chairman, I think my questions have been answered. I wanted some information related to what was actually being requested of Mr. Fischer, and that was the nature of the question. And the second one I was going to ask which was followed up on was any incidence other than the fire incidence one. Thank you.

Chairman Clegg: Ok. I have one question. If I understand your testimony, you have 6 people working on a construction site, instead of living in a motel, they decide to rent a house, that would in your opinion change it from renting a house to suddenly becoming a boarding house. If they were unrelated.

Mark Tetreault: Under the definition of a Code that is correct.

Chairman Clegg: Thank you. Are there any other questions of this witness? Thank you very much. Med, did you want to ask your question of yours – of the Fire Marshal as well.

Med Kopczynski: No. That was really my question was that I want to be clear as to what Mr. Fischer was being asked to do. I wasn't clear.

Chairman Clegg: Mike . . . did you have a question?

Mike Santa: Can I me ask a question of Attorney Hantz.

Chairman Clegg: Certainly.

Mike Santa: I guess I need a clarification. I was under the impression you were here to ask for a waiver of a Code requirement. Is that correct?

Attorney Hantz: I don't think so. And certainly this is our first time through the process. Originally, my letter was sent in as an appeal of this determination. When I had the discussion with Mr. Degnan, we discussed the waiver avenue, as an alternative. And so we did take some time to discuss some options with the Town of Durham. Those discussions are on-going in terms of some options Mr. Fischer's offered to use, hard wire smoke detectors but not the self-closing hardware which gets into details, but would be a maintenance headache down the road in terms of people disabling that. And so instead of some of the structural modifications which would interfere with the use and frankly interfere with turning the property back to for example a rental to family so they can use it. So we were discussing waiver options, but that hasn't really come to fruition, so my understanding is we're here, appealing the determination of the classification. The fact that now these structures after all this time are being considered rooming houses.

Mike Santa: Your letter does say appeal of Durham Fire Department property classification, and a waiver request. So I guess I'm . . .

Attorney Hantz: It's in there because all along, and again we've been instructed by the Fire Marshal's Office that, as an alternative I guess, to appealing the classification, I guess we are also asking that if its a rooming house that we be waived from the rooming house requirements since the property meets the 2-family requirements. But certainly comes from some confusion on the process.

Mike Santa: Alright. The other thing I'm grappling with is, I am trying to rephrase this question properly . . . but . . . you refer to this . . . there's so many Supreme Court Decisions . . . tell me again your thinking relative to that decision and how it affects our decision?

Attorney Hantz: The way I see the Supreme Court Decision. . . it is dealing with, as often happens, when you are in Court, the persons' property rights on the one hand, buy the property, have certain expectations of the use and so you build in accordance with that and your using the property. Then there are various regulations that can be imposed on that, zoning is one of them. You know planning, site plan, that kind of thing, another one. Life Safety Codes another, environmental, you know, septic system regulations another. Always the court has to balance whether the regulation is reasonable in light of the owners grandfathered vested right to use the property as . . . as permitted when he bought it and invested and built and constructed. So, the Supreme Courts' Decision on the zoning limiting occupancy, in my mind is just a template. They weren't discussing Fire Codes at the time, and they weren't discussing septic regulations at the time they were only discussing zoning, but I think the same rationale applies. You have an owner who bought property, constructed these units, has used them and has kept them to Code for 30 years. I think where the same question presented – you can't have a retroactive change, when you are applying the Fire Code. That's how I see them . . .you know, the Supreme . . . and secondly, the Supreme Court has determined the occupancy limit for these uses as duplexes to allow up to six. So the question to the Fire Marshal if there were a limit of four, and some of these units only have four students in them by choice, the students only want to have four, so those I guess we'd submit those units on a year-to-year basis comply. It's just the units that have five or six. The Supreme Court has said that that qualifies as a two-family use, and so we would argue that it qualifies under the Life Safety Code as well.

Chairman Clegg: Ok. Thank you.

Attorney Hantz: Yep.

Chairman Clegg: Chief.

Tom Lambert: My question is . . .did Mr. Fischer have these buildings built?

Attorney Hantz: Yes.

Tom Lambert: And they were built with the intent for a duplex or for boarding houses?

Attorney Hantz: Duplexes.

Tom Lambert: And . . .

Attorney Hantz: They were actually intended as faculty housing, and UNH changed its mind at the last minute, and so they wouldn't become faculty houses.

Tom Lambert: So then they just changed it again. The lease . . .

Attorney Hantz: yep.

Tom Lambert: . . . the numbers quoted there . . . are per individual or per unit?

Attorney Hantz: Those are per unit numbers . . . let me just check. Yup.

Tom Lambert: So then the number of occupancy would be either four or six . . .

Attorney Hantz: up to . . .

Tom Lambert: . . . depending . . . splitting the (inaudible-coughing) monthly (inaudible-to faint)

Attorney Hantz: Correct.

Chairman Clegg: Any more questions of this witness?

James Petersen: I just want to clarify my understanding is that your opinion is that if the Supreme Court had included Life Safety issues in that Decision, your opinion was that they would have made the same conclusion. Is that what I heard you to say in your last answer?

Attorney Hantz: I think the Supreme Court would have looked at the same vested rights issues, property rights issue. There is a slightly different standard when the Court's looking at Life Safety issues in terms of reasonable regulation. I think the Court would have come down on the same side, slightly different analysis but when you are doing Life Safety and zoning it sort of depends on, again, the balance. What's the public interest trying to be served, what's the impact on the landowners rights. But here where you have a use that has met the public safety criteria for 2-family, and you assuming these units meet the 2-family Life Safety Codes, they have met that standard of public safety. So, what we're dealing with very narrowly, is just the change from 2-family, to rooming house, because of the one or two additional people. And, so I think there, the Supreme Court would

come down the same way in that that is a change that's not warranted. Is that . . . ?

Chairman Clegg: Seeing no other questions, thank you. Is there anyone here who has a question of any other . . . Jerry Tepe.

Jerry Tepe: I have a question for Mr. Johnson with.

Chairman Clegg: Mr. Johnson, could you state your name?

Tom Johnson: Tom Johnson, Code Official and Zoning Officer for Durham.

Jerry Tepe: Mr. Johnson realizing this goes back, predates your employment in this position, were certificates of occupancy ever issued for these buildings when they were originally built, to your knowledge?

Tom Johnson: I have no idea. My town records do not show a lot of documentation that we're use to seeing, you know, in this age since the 90's, in the 50's, 60's, and 70's.

Jerry Tepe: And no subsequent CO's were issued, modified, whatever again during the course of the past 30 years or whatever?

Tom Johnson: Only the one that I issued for the fire that was there.

Jerry Tepe: Ok. Thank you.

Chairman Clegg: This witness? Wes.

Wes Golomb: Mr. Johnson, if this were reclassified as a rooming house, is there anything that you know of that would keep the town from having the legal right to shut it down completely?

Tom Johnson: This reclassification's only per the Fire Marshal's concern. The original series of letters went to the Zoning Board of Adjustment as an appeal of my decision requesting building permits for the work mandated by the Fire Marshal. And at that hearing it was discussed by the Zoning Board and myself that these were still one and two-family single family dwellings as a duplex and that zoning stayed in place, and that the Supreme Court case addressed the zoning ordinance only, no other Codes, and that they were grand-fathered for from four to six occupants as duplexes. And it wouldn't change the classification. Unless they abandoned this use for a year and a day, then they would have to comply with current zoning.

Wes Golomb: So you're saying that if they rent it for two years to a family, that would . .

Tom Johnson: Current zoning defines 'family' . . . it defines 'household' as either single family or unrelated household, so under current zoning, these are unrelated households, so if they lose the four to six students out, and rented it to Mr. and Mrs. Jones and their seven kids, for a year and a day, then that particular unit would now be considered a single family household. And not an unrelated household, and would not be able to convert back to the unrelated household .

Wes Golomb: Thank you.

Chairman Clegg: James.

James Petersen: Do you have instances in Durham where zoning in the zoning perspective, a building is classified one way and from a Life Safety perspective is classified another way?

Tom Johnson: I am sure we have many of them. Mark referred to the one unit that had retrofitted with sprinklers because they called it a rooming/boarding house. On my records its still a single family home, but its an unrelated household. My guess is that in the current (staff____position) in place in the 70's when it went to the Supreme Court, that we would have appealed that decision on the Code issues. The fact that, as we all know, in the 70's, you know Code Enforcement in New Hampshire was Live Free or Die, and most towns were just concerned with zoning and not Life Safety Codes and Building Codes.

Chairman Clegg: Ken Andrews.

Ken Andrews: Is your . . .is the Town of Durham's Building Code adopted as an intrical part of your Zoning laws?

Tom Johnson: It's a separate Chapter in the Town Code, and it's referred to . . . it's Chapter 38, Zoning is Chapter 175. So its . . . their referenced, you know, but not adopted in internally.

Ken Andrews: Further question. Is there a statement in your zoning ordinance that requires compliance with your Building Code?

Tom Johnson: Yes.

Ken Andrews: Thank you.

Chairman Clegg: Seeing no further questions, thank you. Tyler.

Tyler Carlisle: I have a question for either of the Fire Marshal's.

Chairman Clegg: Your choice. I would prefer that you use Bill, since the other gentleman has already been up once.

Tyler Carlisle: Fire Marshal, I believe . . . I believe that you and the other Fire Marshal both said that one of the reasons for this reclassification or . . . or change would be safety. In other words, it's a safer building, and because they are doing more things to it because they have more people in there and its unrelated to families. And, the families are more safe than looking out for each other, more safe than unrelated individuals. Am I correct?

Bill Degnan: That is correct.

Chairman Clegg: For the record Bill, because it's a taped record could you identify yourself?

Bill Degnan: Bill Degnan, Acting State Fire Marshal.

Tyler Carlisle: I would like to read a statement out of the Life Safety Code that says 'although most people feel safest in their homes, fire deaths in the home, account for some 65% of all fatalities attributable to fire in the United States'. It would seem to me that that would not necessarily mean that families are more safe than unrelated individuals.

Bill Degnan: Well Sir, your statement is partially true, but there is also a lot more single family dwellings out there than there are dormitories and rooming and lodging housing situations so that the statistics, you know, can be (squeable) a bit by that .

Tyler Carlisle: Thank you.

Bill Degnan: In regards to that, you bring up a very good question. And, if you look at some of the history which I had put in my . . . one of the documents that was submitted to you, of people who had died in off campus housing, it shows a higher degree of deaths and so fourth in off campus housing. Over 80% of the fire injuries and deaths occur in off campus housing vs. on campus. I think that part of that is due to the . . . the regulation of the on campus facilities, such as New Hampshire . . . New Hampshire took the role several years ago that they were going to sprinkler all of their dormitories on all of the campuses. And you can look at the fire records and see where a single sprinkler had, has gone off and saved the building. And, prior to that, there was a few fires . . . Plymouth State in Belknap Hall which caused almost \$60,000 damage to that building. That would have been a one sprinkler head fire and the damage would have been minimal, maybe \$5,000 at best. And at Keene State at Cow Hall, that building lost an entire floor. And these . . . these were buildings by the Building Code that, at the time, they weren't required to be sprinklered, and because of the construction type. But the school has since retrofitted them with sprinklers. And, those . . . those particular instances are, you know, numerous, if you go on and on in regards to those. And its about people and they way that they live and the people that live in our dormitories are no different than people who live in the duplexes that are being in questioned right now. It is about them.

Tyler Carlisle: Thank you.

Chairman Clegg: Ken Andrews.

Ken Andrews: Fire Marshal Degnan . . . how many different editions of Life Safety 101 has the State of New Hampshire adopted officially?

Bill Degnan: Since they first started adopting them?

Ken Andrews: Yes.

Bill Degnan: I would have to go back . . .

Ken Andrews: Guess. Can you guess for me.

Bill Degnan: Oh there's . . . there's probably been . . . at least seven or eight.

Ken Andrews: Why?

Bill Degnan: Because there's changes that are put in place because of things like what happened the tragedy in Rhode Island. People have to die sometimes before we look at a Code in retrospect, to make the corrections, and it's about human behavior. Society has changed drastically. The . . . one of the items that I presented to you was a Supreme Court Decision in regards to the definition of a family. And the family seems to be a quite a lively thing here today, and that . . . that definition basically is saying that there's a head of the household. I don't know if any of those buildings over in Durham, that are in question, have a head of the household. And I think that's . . . that's key here. Is who. . . who's responsible, who's in charge? And some of those changes have come about in regards to how we live, and that's the reason for the changes in the Code.

Ken Andrews: Thank you.

Chairman Clegg: James.

James Petersen: A follow-up to Ken Andrews question. When those changes are made to the Life Safety 101, could you summarize for me how those changes, how you are allowed, how you have the authority to retroactively apply those to existing buildings.

Bill Degnan: The . . . the authority. . . well, to adopt it, we go through the Rule Making process which involves public hearing, and allows, you know, that type of input, and a review of the Codes and questions, such as before this Board, you know, those questions are taken seriously, and we take a look at the adoption process. And after the . . . following the public hearing it would go through the Rule Making process over in the Legislature. So there is some checks and balances, in

regards to how they become a legal document. The retroactive affects of that in some cases can be tremendous and time is given for those . . .you know, for those buildings that need to be retroactively, brought up to Code. And the legal authority comes through the statutes of the Fire Marshal to be able to enforce that.

Mark Weissflog: Fire Marshal . . . in the denial of the original variance, was it procedurally correct, and was Mr. Fischer properly represented per your Administrative Rules?

Bill Degnan: Originally it was requested as a hearing. And that is . . . that is following the statute, that as an act of this Board as being the group that hearings will go before. Our procedures call for a variance request first, so that we have an opportunity to work with the person, the aggrieved party, to try and come to some sort of an agreement and see if, you know, if you can not lessen the Code effects, but other alternatives. We are always looking at engineered alternatives in regards to does it meet the intent of the Fire Safety Code. And we accept those on a regular basis. Structurally, the first application was not correct, but we worked with it, we did back-track with the Mr. Fischer's attorney and took care of the variance process, and we still didn't come to an agreement. So that's . . . we're here in front of this Board.

Chairman Clegg: Seeing no further questions, thank you. Are there any other questions of anyone? Seeing none, Attorney Hantz, do you have a closing statement?

Attorney Hantz: Sure. Briefly. It's not our position that advancements in the Code can't be applied. I think, as I said before, the Code takes great pains, and I think likely, when the Code provisions are developed by folks who sit and deliberate, and adopt them through the Administrative Rules process, there's an ability then to look at changes that may be contemplated and evaluate how those are going to impact existing properties. And I think that is why the Code takes great pains to differentiate between existing properties and new or changed or altered uses. So the Code development and adoption process, allows that focus and that deliberation. The problem here is when you take a new classification and apply it to a pre-existing use no one's had the ability to then, take a look at that impact. So certainly, as the Code provisions on two family dwellings change over time, they are applied to these two family dwellings, and the dwellings have kept up to Code. And that is all contemplated in the Rule Making process. Here, that's not what happened. Up through 2002, these things were expected under the two family requirements. All of sudden now, what we are facing is . . . this isn't a two family house anymore. . . it's a lodging and rooming house. So now, all of a sudden, these properties are put in a different category with different requirements. And so, that ability to look at ok, bring it up to speed over time, just isn't there. And I think that's the problem with this situation. The use hasn't changed. The six occupants per side have been there since the 60's. So nothing has . . . this isn't a house that's become a bed and breakfast. . . it's not

a house that has become a rooming house . . . it's the exact same use that it was built originally for and it's been that way since the 60's affirmed in the 70's, and nothing's changed, except now all of a sudden, the classification so I think that is the problem. In terms of the variance, I am not sure, just procedurally, I am not sure, when you actually read the statute and the . . . the . . . the Administrative Rules that go with it, it doesn't seem to have a first / second kind of thing. We filed our appeal of the decision, we also at the same time filed, you know, the (____) variance alternative because obviously if we can work something out that works for the owner, and the fire department then we wouldn't have to be here taking up your time.

So we've sort of done them parallel. There was one provision, or at least we understood there was suppose to be some sort of hearing at the Fire Marshal's Office before we got here, that sort of happened as a site visit. We weren't involved in that. So there's a little procedural glitch there. This is the first hearing that we have been to, really, on either of these issues aside from discussions that we've had. So, based on the information that you have, and also this issues of families. . . I'm not sure that empirically the evidence is there that a group of five people signing a lease is much different than a brother and sister and some extended family members sharing a house. I am not sure the actual empirical evidence is there to make the distinction between this group of tenants and other extended family groups. So we would say the level of safety provided by the current regulations on two family dwellings, certainly meets the public safety considerations, and that the change in classification to add these rather awkward improvements, or . . . or . . . or structural changes to the house frankly is going to create some more problems than it solves in terms of using the property and doesn't add to the public safety aspect of these units. Whether there are . . . the specific improvements being sought don't have a lot to do with some of the issues that have come up with today, relative to student housing, parties on campus, those sorts of things, it really doesn't matter how these are classified, that issue remains the same, whether it's a house or a dorm or an apartment. So when you actually look at the Life Safety Code revisions, and what's trying to be accomplished, the two family level of fire protection we think is sufficient. As so we would ask for your consideration not to have the classification changed.

Chairman Clegg: Thank you. Fire Marshal Degnan . . . did you have a closing statement?

Bill Degnan: Yes I do. I ask that you look at this in regards to the people side of it, and regards to the application of this Code, and for their protection. Attorney Hantz has talked about procedural issues and as you well know, that there is things have changed in our Rules, that the Rules no longer have any affect in regards to hearings. So there was no hearing previously. If that caused confusion, there really wasn't a hearing. It doesn't exist. The fire calls in regards to the . . . that area it was over 17 calls, just in the last year over there. And if you probably went back for 30 years, you would see a progressive increase in fire calls into that area. Granted, the most recent calls were not inside the structures, but it

shows the way that the people live and their lack of concern for safety. The tenants in those duplexes, they do not behave like a family unit. And the traditional family unit, as I have said before, has a head of the household, they live as a family unit, they eat together, they share all the things that are common to each other. And these people do not live like that. There is quite a bit of discussion in regards to zoning. This is not about zoning. This is about life safety. And it's about the life . . . application of the Life Safety Code. Again, there were some good points brought up, if these buildings were originally built for staff housing as duplexes. That's not the use that they are in today. And that's the use that's been brought to the attention of the owner of the property that they need to be, bringing the buildings into Code. There . . . we . . . we have offered different alternatives to them, to the sprinkler systems and were trying to work to regards to, you know, bringing up the building to some sort of a code compliance. In the definition and classification the building seems to be the stumbling block. And so there . . . therefore, because of the inherent dangers of off-campus housing that puts these students into the rooming and lodging section of the Code, we ask that you, you know, look at that seriously and thank you for your time.

Chairman Clegg: Thank you.

Attorney Hantz and Fire Marshal Degnan . . . do you both agree that you have had ample opportunity to present your case in front of the Board?

Attorney Hantz: Yes sir.

Bill Degnan: Yes I do.

Chairman Clegg: Thank you.

Then I will close the hearing and take the case under advisement and take a 10 minute recess.

Chairman Clegg: I call the Body back to Order. We have before us the information, the testimony and we now should deliberate. I ask that when you state your reasons, be clear and specific for the record. Anyone want to start? Ken Andrews.

Ken Andrews: The first question I have is a Point of Order. The issues before us are stated in a scope of this hearing notice and that's what we should be addressing in our comments and discussion.

Chairman Clegg: Correct.

Ken Andrews: Strictly for the deliberation standpoint, I feel that the determination or classification of the Fire Marshal regarding the subject properties as lodging and rooming housing is correct. We . . . we are . . . are charged with dealing with the State Building Code and it deals with the State Fire Code, and the present Fire Code includes NFPA 101 and the definition is clear in the Fire Code as regard what a 1 and 2 family dwelling house, single family home vs. the lodging and rooming house is. Based on the testimony that I heard anyway, there is nothing that says that the appellant, Mr. Fischer can't still use it as a duplex. The testimony indicated that they in fact were built to house staff and they still could. I don't believe that I heard anything that says they couldn't. The problem we are having is . . . do we do it as a . . . as a boarding house to allow college students and I think most of us sitting at this table anyway have experienced dorm life or at least off-campus life, versus billing it as a single family home and using it as a single family home. There is a difference. I don't know how far I can go with the war stories, the Chair will certainly slap me but I work in a college town and there is a big difference between a single family home and a home occupied by 4 to 6 college students. And, so I personally feel that at least as far as point one is concerned, the Scope, that the determination and classification of the lodging and rooming house is correct.

Chairman Clegg: Anyone else. Med.

Med Kopczynski: Mr. Chairman, I . . . I do think that there is a . . . a separation between the Zoning Code issues and the Life Safety Code issues, and of course, the Life Safety Code issues are the ones we're here to speak to. I think from what at least . . . from what I understand of the usage of the property and . . . and I have some experience in the usage of property and many many years of government service, I think there is a distinction between how you are using the property at present and how it was designed, and I think there is a distinction in a single family and a duplex and even a multi-family unit or units and one that is being used in a different way. I think clearly, student housing, especially student housing in this day and age is one that takes a different . . . different level of concern and care. Especially from the standpoint of Life Safety as represented by numerous decisions that I have made on this particular subject. I think there is a difference, and I think . . . I do think that the lodging house classification is probably the more correct in this case, than the one or two family.

Chairman Clegg: Anyone else? Tyler.

Tyler Carlisle: Yes . . . I . . . I think I would . . . there are a couple of things I am missing over here. And one is that the . . . there was no . . . no determination in these 9 duplexes, 18 units, of how many had 4 and how many had more. And I believe, that I am understanding correctly from testimony today, that if 4 people were there, it would be ok to leave them there as duplexes. And I think I would like it clearly understood that that should be. . . that that would be left that way with the determination. I believe that the Fire Marshal is also correct in his determination

if its more than 4 people from what I have seen so far. But I think it needs to be related to that number.

Chairman Clegg: Anyone else? Joel Fisher.

Joel Fisher: I just would like to reiterate what these gentlemen said. Going through my thought processes, and my first thought was well . . . we have to decide whether there is a separation between zoning and the Fire Code, NFPA 101, and I think they are 2 distinct, different requirements. There is the zoning requirements and there is the Fire Code requirement and NFPA 101. And, other than the fact that local zoning requires compliance with building code, I think the classification . . . the reasons for classification and the classifications for each are different. So, with that being said, I think we need to . . . be looking strictly at the State Fire Code classification versus the local zoning codes. And . . . like these gentlemen have said, I think the classification that the Fire Marshal's Office came up with is correct, to classify it as a rooming and boarding house. So that addresses the first 3 items that they had in their . . . that's in the 'Notice of Hearing', and I believe that, you know, for the purposes of Fire Code, if you look at item number 4 in the Notice of Hearing, it says that the Fire Code does . . . does not determine occupancy and I believe for the purposes of the State Fire Code it does. And I believe that the . . . the . . . the definition of . . . a . . . a duplex, or one and two families that have one, they actually have one family member and then 3 unrelated individuals as Tyler said, so you can have a maximum of 4 people living there. So I think its pretty clear that . . . it should be classified as room and boarding and not a 2-family dwelling.

The other thing that I thought about during the testimony was the fact that the attorney had said that the original construction was specifically for a faculty house, it wasn't for student housing. So, you know, at some point during the use of the facility, it became apparent to the local fire marshal that it was being used as a rooming and boarding and I don't know at what point they became aware of that fact, but at some point they did. And, I believe that when the local fire marshal becomes aware of a change like that, a change in use, it may not really apply to zoning, and it really wasn't a change in use as far as zonings concerned, because even under the current use, its still permitted to use not necessarily as room and boarding, but it's (inaudible-cough) the certain number of individuals to have up to six individuals, I guess. But they are within their right to require that the facility comply with the requirements of rooming and boarding because that's how it has to be classified by the Fire Code. And that's my thought process.

Chairman Clegg: Jerry Tepe.

Jerry Tepe: Several issues some of which have been enumerated already. One I think, it . . . it . . . we have to make clear that the Code, the Fire Code and the Building Code, both, establish a hierarchy of danger to fire and danger to public safety in terms of how they are constructed and how they are protected from fire and how they protect the occupants from fire. One of the things we are dealing with here

is that hierarchy between a single family house and a rooming house and the next step up being dormitories to hotels etc. at least in this particular type of thing. I think its . . . to me at least, very critical that the buildings were originally built, permitted if you will, as duplexes intended for the faculty housing, and that almost immediately, there was a 'change of occupancy or use' to student housing, as was stated in their, unfortunately back those 30-40 years ago, whatever, New Hampshire did not take a strong stance at times in terms of code enforcement. I mean . . . ideally, you know, this change would have been picked up, at least originally, back then, and the changes made accordingly. The third thing is . . . I am not totally sold on whether the four or number there, necessarily, makes a difference between whether these continue to be considered as duplexes or not. The definition for the lodging and rooming houses said 16 or fewer. That could go down to one. So I think . . . I am not sold that we're not . . . I guess we are not being asked to make a decision on that particular item today, of whether that four is the number where we break off or not in terms of which type of occupancy this is classified as.

Chairman Clegg: Wes Golomb.

Wes Golomb: I . . . I . . . guess I don't . . . I'm . . . I'm going back and forth between the two sides here, and I'll tell you my thinking. And . . . on the one hand what hasn't been brought up yet is that this has been like this for 30 years its kind of like a defacto acceptance of the change in occupancy from . . . you know, when it was built as faculty housing to what they have been doing with it. And its been classified as recently as 2 years ago, as a two-family house, as a duplex, excuse me. So I'm concerned about fairness in changing this to the owner, but on the other hand, I was trying to get a feeling . . . I . . . for the safety issues here from my question. The other side of it of course is safety of these kids here, and I got to say, I am sending a kid off to . . . I had never considered this before . . . I am sending a kid off to college next year, and I just assumed that where she was going to live is safe. And, you know, I really hope the town is making sure that the places she lives in, it'll be a dorm at first, but it will be off-campus housing knowing my kid within a couple of years. And, I just hope the town there makes sure its safe. So I'm . . . I'm really . . . and the other thing that concerns me is it sounds . . . and we didn't get a clear read on this, at least I didn't, but it sounds like the owner of this property didn't really take any opportunity to compromise. We were talking . . . I would have been . . . it seemed logical to me that there should be smoke alarms that can't be disconnected. So anyway that's what I'm . . . I'm up in the air at this point, I don't know how I would . . . how I feel about this. But those are the things I am thinking about.

Chairman Clegg: Tedd Evans.

Tedd Evans: I guess . . . I wanted to respond to the couple of things that the attorney said that was sort of their challenge, and it was that the . . . to kind of dispel the issue of being retroactivity aspect one by the Supreme Court decision, the other by the Code itself, I guess she was quoting from the Fire Prevention Code. With

regard to the Supreme Court decision, you know it just seems to me, that, if that . . . if it were true that we couldn't put any of these Fire Codes retroactively to buildings, it seems like we would be in a real mess, in terms of trying to get some . . . some reasonable measure of safety to existing buildings, I mean everybody's gonna come up with another claim well its grand-fathered, because of such and such, and you can't retroactively based on that Supreme Court decision, so I don't . . . I sort-of don't buy that as being worth much. And then, . . . and then the second thing when she was talking about the exist . . . the Code and the revision and this 1.9. . . 1-9.2 that existing buildings that are occupied at the time of the adoption of the Code shall remain in, provided that the following conditions are met: that the occupancy classification remains the same. And that . . . that issue, just came up. And I mean, what was the original classification of that, and what's the subsequent use. And then that number two, is that there exists no condition being hazardous to life or property that would constitute any imminent danger and I think the testimony you heard about the number of calls there, and the nature of the calls and the nature of the activities there are so far away from that intended original use that . . . and I don't buy that we're not . . . that this Code is not letting us apply as retroactively on (inaudible-coughing) as well. So . . . so it seems to me that two of her two basic arguments are . . . are kind of shot out of the water. And in my opinion if this Board is going to make an error somehow, then we should be making it toward the side of safety rather than this guys property rights, while he is collecting all this money, we've got people living there in conditions that may be less than safe and I think that that's going to be our . . . in the end . . . our duty is to be tied to the argument that safety (inaudible-coughing), the critical nature of the safety aspect, rather than the legal part of it, which . . . you know, we will get opinions, subsequent to our opinions, they will take it to the Supreme Court and get some other decisions, but right here, our . . . our point is safety. We are the mandated people to come to for safety decisions, basically that is what we are suppose to be doing. So that is my comment.

Chairman Clegg: George Maihos.

George Maihos: Yes. I agree with the Fire Marshal's decision for several reasons. The . . . I can see the head of house-hold thing . . . it's just not there for the . . . in this particular situation. There is nobody there in charge. There is no one there to lay down the law or set rules in that situation, and the safety of the students is definitely a major concern for me. When I heard that the smoke detectors were either disconnected or removed, you know, if there was a head of house-hold there, they would see that, as say you know we need to connect those back up. You know maybe, maybe something else could have happened. Someone could have died, and I still have a concern about the original classification of the . . . that originally was faculty housing and now, you know, there are a lot more people living in there. And one thing I always look at too, is if something happened, if someone . . . if there was a fatality, and we made the wrong decision, I agree with Tedd, that we need to . . . we need to make sure that we keep safety involved in the back of our heads or even in the forefront, because I would hate

to see a student get . . . die in a fire there where something could have helped, smoke detectors, or sprinklers, or the fire doors or something. That's not . . . it seems to me its not being used as a 2-family dwelling. There are more people there . . . and the head of house-hold thing really does it for me. So I agree with the Fire Marshal's decision.

Chairman Clegg: John Tuttle.

John Tuttle: I agree with the State Fire Marshal's decision based on a couple of issues. One, I feel as though, that the zoning really won't make or doesn't factor into this, because even if we were to build this house in a known commercial zone, the intended use of this building still needs to meet the codes that would govern that use. And it all boils down to occupancy, and this occupancy is either going to be a duplex and its going to have 4 or less occupants, or its going to be room and lodging and have 16 in it. And based on that and that they were originally built as off-campus family housing for faculty, and then that fell through and so it became rented properties for . . for students. I believe that that original classification just never got transformed or passed through the town, and have that meet the intended code then.

Chairman Clegg: Mike Santa.

Mike Santa: Just a little story from the past. In the early 70's, I had the luxury of staying in one of these units on Young Drive, and I can tell you this . . . three bedrooms, one of those bedrooms I remember there was 3 girls in. The other bedroom . . two bedrooms had at least 2 girls apiece, and then there was also a girl living in the basement. Now . . and then, of course, there was other people staying over from time to time which I happened to be one of them, but there is much more than six . . . six kids is the minimum, on either side of that building, that are staying in that unit. You know, the only reason there hasn't been a death in those units to this point, in . . . in my perspective is its been pure luck. Pure luck. And I, I think that fire department is absolutely doing the right thing.

Chairman Clegg: Ken Andrews.

Ken Andrews: Rather than beating a horse, I think we need to go a little bit further. Jerry brought up a real good point. This . . .this whole request is based on whether or not it's a duplex or a rooming and houses. If we focus on that. . then rooming . . lodging or rooming house by definition in the Life Safety or the Fire Prevention Code is very clear. Building or portion thereof that does not qualify as a one or two family dwelling. We stop there, like I said earlier on in my presentation, it was built as a one and two family dwelling. Key word being family. It was built to house 2 families. One on either side. Mom and Dad and a couple of kids or 20 kids, doesn't matter but at least there is supervision there. And from the Building Code standpoint and the Fire Code standpoint, there is a difference between whether or not it's a one or two family, or anything else, and they go on and they define this as not only . . . if it doesn't qualify as a one or two

family dwelling it provides sleeping accommodations for a total of 16 or fewer people, on transient or permanent basis, with or without permanent facilities for cooking, with or without separate cooking facilities for individual occupants, its clearly what its being used for today. Physical occupancy use is lodging and rooming house. It's not being used as a duplex. It can be, like I said earlier. There is nothing stopping this owner from going down into downtown Durham, finding somebody that wants to rent an apartment. That is what it is. One half of a house. Bring your family with you, and live there. They can do that tomorrow morning. We're not the . . .the Fire Marshal is not . . . the Town of Durham is not . . . the State of New Hampshire is not telling them that you can't do that. You are physically using it as . . more than that. So when I get back to where we are suppose to be with these five conditions, I guess, item 4 says.. . that the Fire Code does or does not determine occupancy. Occupancy is or is not determined by use of the building. At the risk of having the fire service throw stuff at me . . . I would say that the second part of that comment is the truer of the two. Because it doesn't say the same thing. This is the second part of that comment that says . . .the occupancy is or is not determined by the use of the building would be the most correct. What is the building being used for? Physically. If it was built as a house, and its being used as a restaurant, it's a restaurant. Ok. And so I believe that once the occupancy has been determined because of the use of the building, then in fact the Fire Code, does determine occupancy classification that goes along with that. I think we first have to determine if the occupancy of that structure . . . is what's its being used for. Physically. Then we go forward and say this is what its been used for, and this is what it is. And if this is what it is, then this is what we have to determine to make it right. And if that fire had occurred and there had been two true families as you and I understand them to be in there, we wouldn't be having this discussion anyway.

And I would like to, if I might Mr. Chair, address a couple of these other issues that need to be addressed. Item 2 says that the denial of the variance was or was not proper. The denial of the variance . . . who went through the procedures and the record should indicate that in fact, the Acting Fire Marshal, Mr. Degan, was clear that the new Rules don't allow for Public Hearing other than the one that we have right here. And I believe that the procedures were followed to the best of anybodies abilities, based on the Rules. I believe the testimony indicated that the State Fire Marshal's office, and the Durham Fire Marshal's office, both proposed alternatives to the outcome. And the alternatives that were proposed were rejected. So, I believe that number 2, the denial of the variance was or was not proper, I believe that the parties involved, engaged in the proper procedures as were in existence, and were unable to reach any kind of common answer and therefor ended up right here, but the fact that they had offered some alternatives and those were rejected, it would lead me to believe that there was nothing done wrong there. And the one that says determination of the State Fire Codes are not or are, either one, are required to be looked at in conjunction with other zoning codes, being in the business, the zoning ordinance starts the whole process. What can we or can't we do there. But it has literally nothing to do with how the building is built, and what we do with means of egress

life safety, fire safety. It has to do with, as has been previously mentioned during some testimony, is it gonna look nice, is it gonna fit in the neighborhood, is it going to detract from values. Doesn't mean that the Fire Codes are not looked at, in conjunction with that, but we have no jurisdiction as to the zoning ordinances, no jurisdiction as to whether or not to build a two exits or three exits or whatever. And certainly the Building Code refers to the State Fire Code and vice versa so they have to be looked at. And number 3, Fire Codes are required to be looked at in conjunction with other codes, without ever saying (inaudible) says, that when it comes to means of egress Life Safety 101 Rules, our State Fire Code is on the top of the list. But it is looked at in conjunction with other codes for zoning ordinances.

Chairman Clegg: Jerry Tepe.

Jerry Tepe: One other thing relative to the retroactivity application of this, the grand-fathering if you will, building codes traditionally, do have grand-fathering provisions in there for existing buildings. However, Fire Codes do not. And I am not talking specifically about the NFPA Fire Prevention Code, or the Life Safety Code, but other fire codes that are out there and in use all have provisions for existing buildings within them. And these are not grand-fathered provisions because they are dealing with slightly different things than building codes are, mainly the prevention of fire in any and all buildings.

Chairman Clegg: I am going to step in now, its my turn. First off, I disagree with some of the reasons you have given. Number one I believe there is grand-fathering I believe we have to have grand-fathering in Fire Codes. I believe the constitution requires that you can't set a Rule, Rule being that the same enforcement effect of law, that would require somebody to do something retroactively. If the Fire Codes all decided now that everyone's house had to be 5/8th fire code (cheebar) and with some of the reasons we've given here, that means everyone would have to go into their house and then lay another layer on top or tear down what they have and put a new layer on. So I disagree. I think that if you don't have grand-fathering in this State, you have a problem. You heard the testimony that this housing was originally designed to be staff housing. But I didn't hear anyone ask the question, was that meant for staff housing as husband and wife and maybe a kid? Or was it staff housing with three bedrooms that said three professors, and maybe their girlfriends or their wives. Which brought it up to six. Nobody asked the question. It was just an assumption here that this was built as 2, 1-family houses. The other problem I have is the fact that they were built I heard, 40 years ago. I didn't hear anyone ask the question, what was the Codes when the houses were built? My experience over the year has been that, it wasn't a strict a Code as there is now. Justifiably so or not. We don't know that back then when they built staff housing that that meant that you couldn't put, if it was suppose to be for 1-family. you couldn't have six people. I ask the question in here if six construction workers came in to do a big construction site, and they rented a house because its a heck of a lot cheaper than staying in a motel, and probably a lot more comfortable, would that then make that house a rooming and

a boarding house? The answer was yes. Is that really what we want to set for precedence? I don't. And whether or not the way a building is being used, determines what its occupancy is. There are restaurants in the City of Manchester run by immigrants. They are restaurants during the day when people are buying food, and there are sleeping bags on the floor where the family sleeps at night. So do I have a restaurant? Or do I have a home? I don't know which one I have. I think the occupancy permit says restaurant. So I think you have to go beyond just the face of this. You want me to be done? Go ahead Rick

Rick Swain: No. When you are done.

Chairman Clegg: Go ahead.

Rick Swain: I'm . . . I have a couple of problems with this. One starts with the whole concept of what is a family. I'll be absolutely honest with you on this. And when I look through all this and I understand the risks of fire service and all this stuff, I was a fireman many years, and I appreciate attempting to make places safer and safer as we go on, but I have a couple of problems. One is that the Fire Code is, in my opinion, poorly written, under . . . well at least . . . this is what we've been given, under 1. . . excuse men . . . under the definition of a single family . . . one and two family dwellings. One and two family dwellings include buildings containing not more than 2 dwelling units in which each dwelling unit is occupied by members of a single family and not more than 3 outsiders, if any, accommodated in rented rooms. First of all, there is no out . . . there's apparently from what we've seen at least in the lease, there's no outsiders in rented rooms. Did you rent the room when you lived there? Or did you just flop? I mean, its hard to control that, I understand that. I just . . . you know what I mean, I mean its almost impossible to control that afterwards. It appears to me from the lease, its a collective group. And when I looked up the definition in the dictionary of what is a family, I'm given the statement from Webster's, that a family is a collective body of persons who live in one house, and under one head or manager. A household, including parents children and servants. I mean a lot of you guys probably have that. And as the case may be, lodgers or borders. That's from . . . that's from Webster's. I thought about that more yesterday and I turned to my girlfriend and asked her, whose the head of our household? I thought it was me. I have the mortgage. I have the mortgage. Ok, So I think determining whether there is a head of household or manager today, and in today's society is almost a moot point because I don't think we have those defined relationships anymore. I . . . I mean, I asked Wes who's the head of his household, earlier, just as a question, he said, she is. Its . . . its all depends. If the trash needs to go out, I'm probably head of trash. Determining the color of my home, which I have had for 20 years, has been determined by my girlfriend, so I'm not sure we have that definition today in our modern society of what is . . . of the family unit has changed dramatically over time. And with the Code constantly refers back to the word family, and the only thing I have found in anything was that somewhere in all this documentation this mountain of documentation, was that they only

definition we can get of family is what is defined by local ordinance, is I believe what . . . what the local ordinance determines what family is. And one of my problems with this whole case is, is that when this building was built, family was defined in the towns zoning ordinances as one or more persons living together in a dwelling as a single, non-profit house keeping unit. When I look at the leases, the leases are severally . . . and severally and jointly liable. To me that creates a single house keeping unit. There . . . you know, I don't think you can look at this as . . . I don't think you can take and look at this as what is the new definition of family in the Town of Durham. And that's really the greatest problem I have with this whole case, is . . . as we being to ask ourselves, I have to . . . I have to dismiss the fact that there was a fire . . . I have to dismiss all that stuff because I have to say to myself, what is the issue here? And the real issue to me is . . . is what is a family today? And . . . and my great concern with this is . . . is that people who don't live in the traditional family unit, if a man and a woman, the Brady bunch is a great example, they are unmarried lets say, the Brady bunch can't live there, if they're not married. Because they would violate, they would . . . be a zoning and boarding house. You know, because their not blood kin, you know . . . I don't know if this . . . if this . . . I actually spent some time yesterday on some websites that had . . . I was trying to find out a little about what family meant, and I spent some time on some urban planning websites and it was interesting, because people all over the country are struggling with this exact problem. Some places are defining family as anyone who lives in the household. Other places are using the more traditional definition that we had in a Supreme Court case, I think the Fire Marshal cited. But my problem with that is it's from 1980. Its a 1980 interpretation of what family is, and I don't know if that really fly's today. Because we have, we have . . . if you had a gay . . . two gay . . . gay men living there or two gay women living there with two children then that would be . . . that would be . . . that would be then a rooming house? I don't think so. It . . . I think would still be a family. And I don't know if . . . because the Code refers to the word family constantly, I don't know if I can . . . I can . . . I can . . . I don't know if I can agree with the Fire Marshal, because I don't know if I can agree with his definition of family. And that is the thing I struggle with the most in all this. I don't want to get myself hung up in the . . . in the . . . in the safety part of it and all that, cause I think you could go crazy with that. You know, I've been in . . . I've been in houses that, you know, I was a fireman, I've been in houses that you just, you know that were, you just shook your head when you went out. But yet they were single family homes, but they were so damned unsafe, that you didn't even want to put firemen in them. You know. So, I don't know, this . . . this is the struggle I have this whole thing . . . is that I really struggling with the actual wording of the regulations and the fact that we don't have a definition . . . good definition of family, so its really left up to everybody's interpretation I think. What is family?

Chairman Clegg: Hang on. Jerry, can you read that section of the Code that you read earlier this morning about definitions?

(unidentified speaker): If I may touch upon this, I think I know where you are going with it?

Chairman Clegg: Hold on, I want him to read it for the record.

(unidentified speaker): And what it is Jerry. What book are you reading?

Chairman Clegg: Jerry, you are taking it out of the NFPA Fire Prevention?

Jerry Tepe: I am taking it out of the NFPA Fire Prevention Code . . .

(unidentified speaker): Is that 72? No? What is it?

Jerry Tepe: From NFPA 1, 2000 Edition, Chapter 2, Section 2-1 definitions, words defined in this Code are intended only for use with Sections of this Code. The definitions set forth in any document referenced by this Code shall be the accepted definition for use in that document only. When terms are not defined, they shall have their ordinary accepted meanings within the context with which they are used. Webster's Third New International Dictionary of the English Language, Unabridged, shall be considered as providing ordinary accepted meaning.

Chairman Clegg: John Tuttle.

John Tuttle: I've read that portion of the . . . of the Code under NFPA101 and I went to Webster's on-line, and looked up the definition of family. And the very first definition that they give you, and I quote is "any number of unrelated people living under one roof". My immediate concern with that was now you have a dormitory. You have any number of unrelated people living under one roof. Is that now considered 'a family'? Can that now be considered a duplex.

(unidentified speaker): Mr. Chairman. My interpretation of what Jerry, Mike Santa just read was that if its not defined in the Code, then you use Webster's. But one, two family dwellings is defined in the Code. So that's the definition we should use. Not the definition from Webster's.

(unidentified speaker): I couldn't find it in the Code. Where did you find that?

(unidentified speaker): I have it in . . . I don't know, it's one of the documents in your package that has definitions, it said one and two family dwelling, one and two family dwellings include buildings containing no more than 2 dwelling units in which each dwelling unit is occupied by members of a single family, not more than 3 outsiders in any, if any, accommodated in a rented room, in rented rooms. And that's where we're getting (inaudible-multiple people speaking at once).

Chairman Clegg: Hold on. It doesn't define family in that.

(unidentified speaker): That's one and two family.

(unidentified speaker): Right.

(unidentified speaker): (inaudible-multiple people speaking at once).

Chairman Clegg: Read your definition again. It doesn't say what a family is. Doesn't say a family has to be married with children of the two people who are married. So when we run into the situation that Rick Swain suggested that 2 gay people join together and they have 3 kids of their own that they bring to the table, is that or isn't that a family? Understanding that we still don't recognize gay marriage. So since there is no actual definition of the word marriage, you have to take the Code that says go to Webster's, when we go to Webster's John Tuttle has done so, and it says any number of people living under one roof.

Chairman Clegg: Rick

Rick Swain: I think another point that was made was that, when we look at the difference in rooming houses, and when we try to define the difference in a rooming house and group of people living as a family, is that the group of people living as a family have no bond or link to each other in any way. A rooming house, I lived in a rooming house once, and you rented a room, I had no clue who the rest of the people in the building were. To be absolutely honest with you. You know, \$15 bucks a week, was a great life (inaudible). I didn't know who the people were in the house other than me. I went to my room I shut my door and that was it. These people rent this, I think the real problem that I have with this is the way the leases were set up, is if there severally and jointly liable for the lease they have a contractual relationship to each other. They have a real relationship to each other. These are not separated rooms per say, I mean you stayed there one time, I am assuming this is pretty open . .

I didn't live there, I lived kind of more like in animal house. But it was . . . it was . . . you know they are kind of all living there almost in a communal state I think, it would be a good way to put it. Because they are not individually in their little teeny private rooms and you probably don't have each person locking their butter up in their refrigerator and . . you know. Admittedly, there's probably some issues that with the fire service and safety. I'm not trying to take away from that at all. My problem with this whole thing is . . . is what are we gonna define as a family. And I think that because of the fact that the way they lease these, that they are all jointly and severally liable for the lease, if these 5 people could sign this lease, this sample lease they gave us, if 4 of them move out, the other person has to come up with the rest of the money. I think that they've formed a bond as weak as it is and I think by the definition of family, they are technically today, a family. And this is my whole problem with the whole thing.

Chairman Clegg: Let me just remind everybody that this transcript will be verbatim. And if there is an appeal through the Courts you may want to be careful about

our past . . . flop houses . . . animal houses . . . (inaudible-more than one speaking) Jerry Tepe you had requested first.

Jerry Tepe: Reading further if I may, from NFPA 101 the Life Safety Code, I am specifically in Chapter 24, One and two family dwellings, reading from the appendix and I don't know if you want me to read all this verbatim, but it does say in here the Code does not define the term family, the definition of family is subject to federal, state and local regulations etc. However, it goes on. The following examples aid in differentiating between single family dwelling and a lodging or rooming house. #1 – an individual or a couple, two people, who rent a house from a landlord and then sublease space for up to three individuals should be considered a family renting to a maximum of 3 outsiders, and the houses should be relegated to the single family dwelling in accordance with Chapter 24. #2 – A . . .

Tedd Evans: (inaudible) I am sorry, but that is in the handout, here so everybody can read them all if the decide to. I agree that's critical, the last page of the handout is what it's in.

Jerry Tepe: Ok. #2 – A house rented from a landlord by an individual or a couple to be both, in which space is subleased to 4 or more individuals, but not more than 16, should be considered and regulated as a lodging and rooming house in accordance with Chapter 26, And #3 – a residential building that is occupied by 4 or more individuals but not more than 16, each renting from a landlord without separate cooking facilities, should be considered and regulated as a lodging or rooming house in accordance with Chapter 26.

Tom Lambert: I think I'd have to agree that the classification the Fire Marshal put out is correct. I'm not sure that we're gonna be able to sit here today and readily define a family. It may be easier . . . what needs to be defined is what is not a family. I would not consider a 4 or 6 folk getting together to find some housing in college a family. Whether they are bound to each other by if someone bails out or not, they have to pay the rest of the rent. I don't think that that's gonna hold up as a family definition. They don't go . . . as a family to rent, they go as individuals who have found each other to rent, and that their . . . their only tie to each other does in fact become the liability of taking care of someone who leaves. And as far as, you know, the (inaudible-coughing) was originally built for a different classification, the classification as to defined by its use.

Chairman Clegg: Med.

Med Kopczynski: Mr. Chairman, I don't think I can add any more to that. I was just going to say that the definition of family is very difficult to find a bright line today. Its a very difficult equation that we all go thru when we are looking at building construction in that regard. And that's all I was going to say Mr. Chairman.

Joel Fisher: I would just like to add to what the Chief said about family and not being a family. Its obvious to me that its just . . what it is, its a group of college students who got together to rent a house. At the end of that lease, are they gonna all move to another house together? No. They are going to go their separate ways. Maybe they will come back again next year, maybe they won't. You know, to me its clearly not a family. But, again, we're not . . . you know, we're not gonna be out there establishing the definition of a family is, but, based on what Jerry pointed out and Chapter 34, its clear that should be classified as lodging and rooming house. Based on that . . . the third paragraph in that Chapter 34.

The other issue I want to touch on a little bit more was the grand-fathering. And I . . I definitely believe there should be grand-fathering, and I work on a lot of buildings where there are certain things that are grand-fathered. But the Code makes provision for and gives authority to the local fire official, or code enforcement officer to make the determination of when he sees something that, in his opinion is . . a threat to life safety, which is a lot of times based on current events, and you know, the direction of the Code is . . . is based on events which occur, especially the Fire Code, you know, those situations all of a sudden there's a rash of fires in night clubs and may strengthen the Fire Code so, that when they go in, they're gonna be, you know, other existing buildings when it's a real threat because something has occurred time after time, to bring existing facilities up to Code. I believe this is, sort of, the same thing. There is, you know, its very obvious at this point in time (inaudible) you get a group of college kids together in a house that there is an increased risk over what you would have if it was, you know, truly a family unit with a real head of household, or two head of households. You know, its very obvious to me. And, you know, citing the issues that you had, the questions you had drawn up about having, you know, 6 construction workers living together, you know . . . yes, under the definition of the Code, that would be . . . that would make it classified as a rooming and lodging house. Under that situation is the risk significantly greater than it would be if it were just a family unit? You know? Maybe, maybe not. But, clearly in this situation we have a group of college students living there and it is much greater than it would be if it was a single family unit. You know, that . . .who can say for sure, but based on the letter of the Code, its obvious to me that the classification of a lodging and rooming house is correct. And, you know, the application of the . . . the Fire Chiefs . . . the Fire Marshal's judgment that yes there is an increased risk here enough so that you should require the building owner to at least make some attempt to bring it a little bit closer to compliance with the Code for fire protection. I believe that's a reasonable judgment in this case.

Chairman Clegg: Let me remind you that . . .

Med Kopczynski: Mr. Chairman, just a clarification to what Joel said. . . I believe I heard him say Chapter 34, its in fact Chapter 24.

Joel Fisher: Oh I'm sorry, my fault (inaudible).

Chairman Clegg: Let me remind you that whatever decision you make here carries forward over under all circumstances, so you can't . . . you can't base your decision on whether or not this is 6 construction workers or 6 college students. Because . . . and it also has far reaching effects. Its not just about this one piece in Durham. This goes to Durham, to Nashua, to Hooksett, to Goffstown, no I'm sorry Henniker, to Goffstown, Keene, Plymouth, this effects all the off-campus housing, everywhere there's off-campus housing. So, I want you to understand that if it will . . . after you make a decision here, that decision carries forward, so every off-campus housing will have to have . . . will be subject to the same degree that we subject this one facility in Durham.

Go ahead.

Joel Fisher: Well, if we decide that yes indeed it is classified as a rooming and lodging house, that does not necessarily mean because the grand-father provisions, that every single one of these existing facilities needs to be brought up to current Code. It's going to be based on the judgment of the local code enforcement officer, correct?

Chairman Clegg: We have got on record here today, some people believing that you don't grand-father a Fire Code. And some of those statements were made as part of the decisions law. So you have entered into this record by many here, that you agree with the decision because it shouldn't be grand-fathered when it comes to Life Safety Code. Whenever a decision this body makes, and we knew it when we passed the legislation, this gets carried forward. There should be no more appeals . . . if . . . if . . . this body decides that this type of arrangement is correct, and complies with the Code and shouldn't be called room and lodging, every time someone comes to the Fire Marshal's office and says, I have 6 people living in a house and I think it's a room and lodging, he will automatically refer back to this body's decision. And that's the way it will go. Assuming that what we do, or until what we do, or if what we do goes to the Supreme Court and someone disagrees with us. This reaches all across the State, this isn't just one case. This is every off-campus housing unit.

Jerry.

Jerry Tepe: Mr. Chairman. In view of what you just said, I would wish to clarify and make sure that I am understood in what I meant when I was referring to the grand-fathering earlier. Building Codes have a 'blanket' grand-fathering clause. And what I was attempting to say is that Fire Codes do have applications to existing buildings but they also do have provisions if you will, for grand-fathering and I specifically refer to Section 1-9.2 of the Life Safety Code where, which was cited earlier, which specifically states that existing buildings are occupied at the time of adoption of this Code shall remain in use provided that the following conditions are met. And then it went into that about the occupancy classification remaining the same and no condition that presents an imminent danger. So there is some grand-fathering within the Fire Codes, my intent was to say is that

is does have some application to existing buildings and Fire Codes, but Building Codes, generally, do not.

Chairman Clegg: Wes.

Wes Golomb: I just wanted to come back, thank you, too what Joel was saying, because I . . . when you gave the example of the night club . . . when you were saying was if they've got new Rules for night clubs, then that night club, which has always been a night club, has to meet those new Rules. And that makes a lot of sense. But they don't suddenly call it a . . . an amusement park and then super impose Rules on an amusement park, rather than a night club. And my concern here is (inaudible) . . . as recently as 2 years ago, Durham acknowledged this as a two . . . as a duplex.

(unidentified speaker): Did they really though?

Wes Golomb: That's what we were told didn't they? There was a fire . . . am I correct? Please correct me if I am wrong, if I misunderstood this. There was a fire inspection 2 years ago, and they called it a duplex. Now if there is new Rules for duplexes, I would agree that this needs to meet them, under this line of reasoning. But this isn't new Rules for a duplex, this is completely different. And, its been, as far as we know, in the same occupancy, since it was completed, and we don't have the records for that, but that's what I was led to believe. There never was faculty housing there, so again, there was a de-facto acceptance that that was what this was. No?

Chairman Clegg: I have somebody else here.

(unidentified speaker): Can I quickly add to Wes's comment?

Chairman Clegg: Go ahead.

(unidentified speaker): I believe in the information the was given to us by the Fischer group the first time, there is a year missing on when it was a duplex versus or when it was rented to the students versus when it was built.

(unidentified speaker): The first year?

(unidentified speaker): There's a year missing in the numbers, there is 35 years and they have been built for 36.

Chairman Clegg: Ken Andrews.

Ken Andrews: Just a little bit clearer on what Wes said. It is a duplex, what I understand, what I understood from testimony today it is a duplex. If you went in and looked at it today, by the Code it is a duplex. Not being used as a duplex, but it's a duplex. I don't think that's an issue. The other thing is I also want to

clarify . . I don't think that . . . the record will indicate that I said the Fire Code grand fathering, and I wanted to clarify. There are many sections in 145 as well as 149 that clearly state that existing structures have certain degrees of protection that are afforded (inaudible) grand-fathering in the Fire Code. And I don't think anybody ever said that there was no grand-fathering, and I guess . . I guess strictly from an enforcement officers standpoint, grand-fathering is needed as our Chairman stated, grand-fathering is needed. There are many many documents and many many sections of case law the State of New Hampshire that have dealt with grand-fathering. I think the more you look into it, the more you read, then what you have today is good, forever. Nobody's gonna touch it. It's grand-fathered. The minute you change it, or otherwise effect it, all bets are off. Your no longer grand-fathered. We will give you that protection right now, forever, forever and a day. Just the way it is. That was grand-fathered as a duplex, (inaudible) a grand-fathered as a duplex. It's not what it was built for, its not what it was intended for, its not what its being used for.

Chairman Clegg: Rick Swain.

Rick Swain: Looking back at the Supreme Court case in 70 . . I don't know what this was, there's so many different years floating around . . I have not been , , , I have November of 75 I guess is when it was final . . . I mean it specifically states in here that previous to 1971's Durham amendment, family was defined in the Town zoning ordinance, as 1 or more persons living together in a dwelling as a single, non-profit, house keeping unit. So when it was originally built as a duplex, and it was used, the way it was used since the beginning, it was legal. So how could a zoning ordinance change, that changed the definition of family then changed . . forced the people to change the use if they haven't done any substantial changes to the building or haven't changed the use of the building. This is . . . this is one of the struggles I have with this. I mean I heard the comments that it was originally built as faculty housing but it then got used as student housing, but it wouldn't have mattered if it was faculty housing or student housing or it was housing construction workers. Because a family, previously to 71, was defined in the Town of Durham as 1 or more persons living together in a dwelling as a single, non-profit, housekeeping unit. I'm sure they are a non-profit.

Chairman Clegg: Joel.

Joel Fisher: I think what the thing we need to differentiate is the definition of family and the local zoning regulations versus the definition of family if any, and the Fire Code and the issue of whether or not it's a family, I don't think really applies when you are reading through the . . . the provisions of the Fire Code. And . . . in determining a classification as a rooming and boarding house. You know, if you go back to the Chapter 24, it clearly states a residential building that is occupied by 4 or more individuals but not more than 16 each renting from the landlord without separate cooking facilities, should be considered and regulated as a lodging or rooming house. I mean in my mind, its not a family, but you

know, regardless of what the . . . the local zoning regulations say, I don't . . . I really don't think that applies.

Rick Swain: Excuse me. Where were you reading that from?

Joel Fisher: I'm sorry. Its Chapter 24, its in the handout, it's a portion of the 2000 Edition (inaudible)

Rick Swain: Ok ok. Because that kind of conflicts with what the definition of lodging and rooming house is, because the definition under 2-1.96 a lodging and rooming house is a building or a portion thereof that does not qualify as a one or two family dwelling. And that provides family accommodations for those 16 or fewer people on a transient or permanent basis, without personal care services, or without meals, or without separate cooking facility, but without separate cooking facilities for individual occupancies so the actual definition of a lodging or rooming house is a building or portion thereof, that does not qualify as a one or two family dwelling and then if we go to the definition for a one or two family dwelling, I don't . . . I don't . . . that's where we hinge everything, is off this exact definition here. I'm not sure it really defines what they have there is not a one or two family dwelling. That's my problem with this whole thing. If we keep falling back, to the definitions, we're stuck with that problem of trying to determine what is a family. And we look at Webster's, these people comply.

Joel Fisher: Right,. But if you read it talks about a one or two family dwelling, it talks about a family. Right.

Rick Swain: Right.

Joel Fisher: And then, it specifically says in Chapter 24, that the Code does not define family. And then it goes on further, this being the appendix, to give an explanation of what the intent of the Code is. Its not the intent to define a family, but it refers to, you know, federal, state regulations, and so forth. But it gives examples of what the intent of the Code is, in trying to define what a lodging or rooming house is. And the types of characteristics that a particular occupancy are, to make it be . . . cause it to be considered as a lodging and rooming house. I think it specifically includes the definition of family because it doesn't want to get . . . because the Code doesn't . . . and its not the intent of the Code to define that. I mean the Code is . . .

Chairman Clegg: But I think what Rick's point was is that we're talking . . he's speaking more to . . . to . . . how or what the definition was when these units were built.

Rick Swain: Correct.

Chairman Clegg: And now you will find a brand new definition on to something that's already been there for 36 years.

Rick Swain: Correct. And it seems like the Supreme Court supports the . . . the concept because the Supreme Court says right at the end of their decision that the White Enterprises can not be permanently enjoined from renting or leasing their premises in questions to groups of four or . . . four unrelated persons that would limit their nonconforming uses. I . . . I don't know. I'm . . . and . . . and when it was built the exact definition of family which we have . . . are given . . . if Durham had never had this definition of family, I wouldn't be struggling with this. But when this was built, the definition in their zoning of family is . . . is the words one or more persons living together in a dwelling as a single, non-profit, housekeeping unit.

Joel Fisher: But that is part of the zoning.

Rick Swain: But that's the only definition we're given. There's . . . we've all agreed that the Fire Code doesn't define family. So we have to go back to something that we're . . . that is defined. And how can the . . . if it was built under that definition, and the Supreme Court agrees its a duplex with Ken, and how can they then re-define the word family and then make it retroactively apply to this building (inaudible-cough) This is my struggle with this whole thing. You know, if . . . if they never had the definition of family in the beginning of their zoning, I wouldn't of had . . . I really wouldn't have a big problem with this. But its that 1971 pre-1971 definition of family which really allowed any group of people in any building, could be 50 people in one building. Could be defined as a family in 1971.

Joel Fisher: By the zoning regulations.

Rick Swain: By the zoning regulations. Well, that's the only definition you have. You have to . . . its . . . I mean you just said we'd go back to local definitions. Local regulations.

Joel Fisher: We're not looking at the zoning, we are looking at the Fire Code which was totally, and very decidedly, . . . the Fire Code was separate from the zoning because its . . .

Chairman Clegg: Except that it goes back to the question of whether or not this was a legal use of the property. And Med felt including obviously the Fire Code back then if we even had one. . . at the time it was built and the occupancy was started. As this has been going on for 36 years, and now we have a new fire code officer that says that it can't . . .it can't continue to be used as that. And that's what he struggles with, that's what I struggle with, if we don't grand-father then every time we pass a new Code, or new law, we can change what a structure has to be.

Joel Fisher: Well it can still be classified as a lodging and rooming house and it can still be grand-fathered.

Chairman Clegg: (inaudible) before us. I . . . I have to let Med.

Med Kopczynski: I . . . I actually think that this discussion is helpful, because its zeroing in on a lot of the underlying questions, and I think the question is that basically defining the family. You are probably getting beyond the grand-fathering discussion to some extent. But if you're not defining family from the standpoint of the Life Safety Code, then I think you do have a grand-fathering. Am I correct Mr. Chairman, do you think?

Chairman Clegg: I would agree with you. Wes.

Wes Golomb: If we accept the zoning definition of family, then its what . . . more or up . . . one or more people, if we don't accept that, then the Code says we get back to the definition of a one – two family dwelling, that we go to . . . go to Webster's and fundamentally, Webster's has the same definition now as the pre 1971 Durham definition. So either way, it seems to me that we are in the same place.

Chairman Clegg: Ken is your hand stuck like that?

Ken Andrews: I don't believe that family is the question here at all. I believe that what we are dealing with is . . . in a one and two family dwelling, a duplex, defined, a duplex is defined in the Code. Is its a duplex, or is it a rooming house with lodging? (inaudible-coughing). The question isn't defining family, the question is is it duplex, or is it a rooming house/lodging house. Those terms are defined in the Fire Code. We don't have to worry about what a family is or isn't. That's not the question today. Its not in front of us today. What ever part of this is it a duplex? Or is it a rooming or lodging house? And both of those, all of those terms are defined in the Fire Code. So I do think there is question on interpretation from definitions, its there. We are going down a real long road that we have to really be careful when we start mixing zoning with Building Codes or Fire Codes or other codes, because as our Chairman has so clearly stated, our decision today will go right into the future, long after none of us are sitting here. We have to be real careful, and think about the ramifications of a decision, either way here. Either way. Because long after we're gone, someone will be able to look back at today and say, ok guys, this is where at. And I would submit to you that we spent the last hour discussing family, and that's not even part of the discussion. It shouldn't be. Is it a duplex? Or is a rooming/lodging house? And that's the question. And we have definitions for each of them.

Rick Swain: Where's . . . where's . . . just a question . . . where is duplex defined?

Ken Andrews: One and two family.

Chairman Clegg: The problem is I think, that . . . (noise like something heaving dropped on table)(inaudible) exactly, the problem also is that a rooming and lodging house, as I believe Jerry Tepe read us the definition, is 16 or less. So you could call a facility with one person in it because it is less than 16 . . . a rooming and lodging house. So I think that when you take all of it together the definitions are

pretty poor. They almost look like they were done by politicians. They didn't want to upset anybody. It makes it very difficult.

Ken Andrews.

Ken Andrews: Whether the definitions are poor or not, its all we have right now. We have the Code in front of us, it's been interpreted by the Fire Marshal's office, and the Town of Durham, whether we like the definitions or not, we have to work our way through what these Codes are saying to us. Right now.

Chairman Clegg: You are correct, Ken. And that's what we are trying to do. Which is why when we look at duplex, we talk about one and two family. If we don't make a distinction between family and a rooming and lodging house that could be one person, we're in trouble. So in essence, the two definitions conflict with one another. There's a house with one person, could be a rooming and lodging house.

Ken Andrews: If he's paying rent, it probably is. If he's paying rent.

(unidentified speaker): Well then any rental property, basically, becomes a lodging house under that definition. Right? Any rental house. Any house that's rented is now a lodging.

Chairman Clegg: I suppose if I was a lawyer, I could argue that one both sides too.

(unidentified speaker): Oh I am sure.

Wes Golomb: Well, , , if I may continue Mr. Chairman . . . I just want to come back to what Jerry said here and I'm not sure that I agree . . . I agree with perhaps where you want to go with this, but, if we come back here to this definition of one and two family houses, it uses the word family repeatedly, and doesn't . . . its not defined anyplace, but we have to go back by what the Code says when we see that word and question what it means, we have to go back to Webster's here, because its not defined anyplace else within this duplex, one and two family Code thing. So I don't think this is not . . . with all due respect, I do think that family is a part of this because its clearly a part of the definition. And we end up arguing over what that means.

(unidentified speaker): Its the defined point of the definition.

John Tuttle: Could you two use a term of art?

(unidentified speaker): Not when they tell us to go to Webster's.

John Tuttle: But the Code is using the word family to define, what we all know is a preconceived idea. And we all know that lodging houses are meant to meet a preconceived idea. So be as society changes and changes the definition of it,

the fact still remains, that the Codes were written around a certain occupancy style, and that style was defined at that time.

Chairman Clegg: Except John, is that we're looking at the new Code, which is 2002 I think you read.

(unidentified speaker): 2000

Chairman Clegg: 2000? And the preconceived notion of family in 2000 was much different than it was in the 70's. And I'm not sure which definition, although in Durham, it seemed that they were quite progressive in their determination, maybe being a college town. So I guess the problem I have is with whose preconceived notion of family should we be using? Mine or yours?

Rick.

Rick Swain: I'm sorry I did not bring this with me today, but I spent a lot of time trying to figure out what the word family meant yesterday. And actually, I believe that if you look at the Merriam Webster's the original definition of family goes back to 1913. I believe. The 1913 Edition, cause I spent a lot of yesterday on the internet, trying to figure this out. Cause I struggled with this yesterday. With just the concept of what is family today. Because it seems like to me the crux of this definition is the key to this definition.

Chairman Clegg: For some of us family is defined as those who borrow money from you and never expect to pay you back. Jerry.

Jerry Tepe: Mr. Chairman. One . . . numerous references have been made to that we are reading out of the 2000 Edition which is what's currently adopted by the Fire Marshal. I did go back in my library to at least 1970, the Life Safety Code, 1970, which is as far back as my library happens to go, and I believe that edition was adopted at the time by the Fire Marshal. The definitions of one and two family and lodging and rooming houses, I can not swear right now are identical but they certainly are very close to identical as to what was in the Code in 1970. The intent certainly has not changed between 1970 and 2000 Editions.

Chairman Clegg: Med.

Med Kopczynski: Mr. Chairman, as we go around this tract, again and again, is it appropriate to continue this hearing to get more information? Ask for more?

Chairman Clegg: We can continue deliberations, but we can't ask for a new hearing.

Med Kopczynski: Well, I mean deliberations, if fine.

Chairman Clegg: What's your pleasure? Mark?

Mark Weissflog: One point to make, in keeping with that, if there was any discovery we could do with reference to the local definition of family, I'm on the fence here, and I would have to agree with Rick, I think family, the definition of family, if we're gonna by a strict interpretation of the applicable Codes, is pivotal, in trying to determine for myself, what we should or shouldn't do.

Chairman Clegg: Med.

Med Kopczynski: I don't know, for me . . . I guess the question is has there been a changed in the use. Even though the definition may have changed. The question is has there really been a change in the use of the buildings. The definition of family back in 1970 might have been very similar to the definition of family today. But I think what's important is . . . is really is . . . the use of change, has the actual use changed, and if so, has it now made, and this is my original statement, is it more like a lodging house than a two family, in its actual use. And I think that's a matter of degree and it's a matter I think that Jerry was talking about when he was talking about hierarchy. When you are looking at Building Codes and Fire Codes, Plumbing Codes, Electric Codes, they take into consideration risks, they take into consideration the use of the buildings, and the types of things that the occupants would have familiarity with. And I guess that's part of the question that is running around in my mind. Is, has there really been a change in the use, the actual use of the buildings, that requires a greater degree of care and concern. And that gets to me around the grand-fathering issue, to some extent.

Chairman Clegg: The problem I think, is that we are not allowed to take new testimony, wouldn't be allowed to contact Durham, since they are part of this, couldn't contact the owner. So I don't know how much you can do, if we held off, because all we are suppose to use is what's before us.

Tyler.

Tyler Carlisle: I think there questions to be answered in the zoning case that was taken before them, because it said back in 1970, because it said 4 to 6 people in there. So therefore, it hasn't been changed since 1970. There has been no change.

Med Kopczynski: Well, I'm . . . I'm not totally convinced that that is so. I mean I know . . . I understand what you're talking about from the standpoint of the zoning and etc. but the question is . . . is there a greater degree of care and concern with that type of occupant load. That's . . . that's what's going around in my head.

Chairman Clegg: Well, we can do a couple of things. I don't think that pushing it off and bringing in new evidence would . . . would help us. Should this get appealed. But, its my opinion that we could rule, or your could vote on whether or not this . . . this type of occupancy should be considered a rooming room and lodging or boarding, now I am getting confused to what it is in the Code . . . what should be grand-fathered based on its use for a year. That sets up one scenario,

you could out-right decide that the Fire Marshal's decision is correct, and that it is a room and board, boarding house and that it has to comply with the new Codes. I don't see anything else that we could do. Other than deny, or . . . or to reverse the Fire Marshal's original decision. I guess that's three things we can do.

(unidentified speaker): Mr. Chairman. I think there is a potential fourth option. That we can find that the classification is correct. That under provisions I believe its in 1.9, or 1.5 I can't remember which of the Life Safety Code it is an existing occupancy that can continue in use but we can find that the Fire Marshal has displayed an imminent danger in this particular case, which negates, in this particular case, the grand-fathering issue. And that is specifically spelled out in the Life Safety Code, that the authority having jurisdiction upon determination of such hazardous conditions that pose an imminent danger, that they can, in essence, apply Code provisions to existing occupancy.

Chairman Clegg: Ok. I don't see where that's much different than saying the Fire Marshal's right and not going to give them any grand-fathering, so . . .

(unidentified speaker): Well, to me at least, its putting a specific clause on the grand-fathering.

Chairman Clegg: Well, when we read the decision, we'll have to put that in there, obviously.

Joel.

Joel Fisher: Sir. I don't think what Jerry is saying is that we're saying the Fire Marshal is right in saying that it has to comply with all the requirements of a new occupancy. I'm not even sure that the Fire Marshal's office is saying that. I think the Fire Marshal's office and the local fire marshal were looking for a certain degree of fire safety, not necessarily compliance with all the requirements of the Code. I think . . . I think we need to go back to the scope of the hearing, go through each of these items, one, two, three, four and five, and say yes or no on one, and I can say yes clearly on items one through four, the only thing I am not clear about is how to answer number five. If you want, we can go through each one, read them, and that there.

Chairman Clegg: You want to take a vote on each one of them separately?

Ken Andrews: Point of order, for a question. In this format, being new to all of us, are we looking for a simple majority, two thirds, or what?

Chairman Clegg: It is my understanding it's a simple majority. But there can be a dissenting view. (inaudible)

Ken Andrews: Ok.

(unidentified speaker): Second point of order. You need to take this, at least initially, as a binding vote, or can we take it as a (inaudible) straw vote?

Chairman Clegg: Since its on the record and we're in (inaudible) with it, I would say any vote we take is not a straw vote.

Mike.

Mike Santa: Are we entertaining per waiver request at all?

Chairman Clegg: No.

Mike Santa: No? Ok.

Chairman Clegg: If she wants to request for a waiver, she can go through . . . she has to go through the process. You have to ask both the Fire Marshal, and appeal his decision, and the state fire marshal and then come to us. It wasn't part of the original scope. I understand why she tried to sneak it in. I probably would have done the same thing.

(unidentified speaker): Throw everything out.

Chairman Clegg: Alright. The first one was the determination as to whether or not the Fire Marshal's classification of the subject property as lodging and rooming houses is correct.

I am actually going to do, you can't advise me, can you Marta, because you're sitting next to him. Ok.

(unidentified speaker): Are you going to do a roll call Mr. Chairman?

Chairman Clegg: I am going to do a roll call.

Jerry Tepe: Mr. Chairman, may I request that you read all five? Unfortunately, I don't seem to have that piece of paper with me.

Chairman Clegg: Ok. The first one was, the first question was: the following issues both parties shall be prepared to submit a hearing documentary as well as testimonial evidence to support their position on the following issues.

1. Determination as to whether or not the Fire Marshal's classification of the subject properties as lodging and rooming houses is correct.
2. The denial of a variance was or was not proper.
3. The determination that the State Fire Code are or are not required to be looked at in conjunction with other zoning Codes or Building Codes?

4. That the Fire Code does or does not determine occupancy and occupancy is or is not determined by the use of the building.
5. The renovations updating the subject property are required or not required giving consideration for the statement by the Fire Marshal that if a sprinkler system was installed, it would allow some trade-offs on the other issues.

First question would be whether or not the determination as to whether or not the Fire Marshal's classification of the subject properties as lodging and rooming houses is correct. Are you ready for the question? We can do roll call or we can do hands, I don't care which. You want roll call? No? Hands? Alright.

For those who believe that the determination by the Fire Marshal as to the classification of the subject properties as lodging and rooming houses, would you raise your hand. 10. Those who don't believe. 5. Ten yeses and five nos.

Those who believe that the denial of the variance was proper raise your hand. 10 again. Those who disagree. 3. Last vote we had 15 this time we only had 13. What happened.

(unidentified speaker): I didn't vote.

Chairman Clegg: Well, you need to vote on everything, or I'm gonna do roll calls.

(unidentified speaker): Ok, I will vote against it.

Chairman Clegg: How many people believe on question two that the denial of a variance is proper. Raise your hand. How many disagree?

Chairman Clegg: The third question of the state fire codes are not required to be looked at in conjunction with other codes. I think that is actually the question, its not whether it has to be, oh I see what you are getting at. Ok we'll split into two. Those who agree that the Fire Codes are not required to be looked at, with or in conjunction with zoning codes, raise your hand. Does everybody understand the question?

(unidentified speaker): Say that one more time.

Chairman Clegg: Those who believe that the State Fire Codes, are not required to be looked at in conjunction with zoning codes, raise your codes.

(unidentified speaker): Zoning or building?

(unidentified speaker): Zoning.

(unidentified speaker): Zoning or building.

Chairman Clegg: I know that, that's why we split the question. That's why they made me Chairman. Those . . . those who disagree? Alright it looks unanimous on that one.

Those who believe that State Fire Codes are not required to be looked at in conjunction with building codes, raise your hand. Those who disagree with that statement. Once again that's pretty unanimous.

Fourth question. Those in favor of the statement Fire Code does determine occupancy, raise your hand.

(unidentified speaker): Can you say it once more.

Chairman Clegg: Is that because you are an electrician?

(unidentified speaker): I want to make sure my vote is . . is correct.

Chairman Clegg: Alright. Those who . .

Ken Andrews: Point of Order.

Chairman Clegg: Point of Order, Mr. Chairman.

Ken Andrews: Point of Order, Mr. Chairman.

Chairman Clegg: No . . . I was . . go for it.

Ken Andrews: Do we have the ability to modify that at all by adding one or two words?

Chairman Clegg: What would you like it to say?

Ken Andrews: I would like to add one word to the first part of that sentence. And so that sentence would read: That the Fire Code, does or does not determine occupancy classification. And then do the second question separate.

Chairman Clegg: I actually think that that's what the intent was anyways. Does anybody disagree with that? Alright. The question is: Who believes that the Fire Code does determine the occupancy classification. 11 yeses. Those who disagree. Ok.

How many people agree with the statement, occupancy is determined by the use of the building?

And the last question. Concerning the subject property that we just heard, I will read the whole question, and then I'll phrase it into something we can vote on. The renovations updating the subject property are required or not required giving

consideration to the statement where the Fire Marshal let that if a sprinkler system was installed, it would allow some trade-offs. Question is for this subject property, how many feel that the renovations updating this subject property, are required. Raise your hand.

(unidentified speaker): Point of Order.

Chairman Clegg: What's the Point of Order? You are suppose to ask those questions before we vote.

Ken Andrews: Forgive me Mr. Chair.

Chairman Clegg: The question is Ken is are renovations updating the subject property required or not required. I can't do it any other way. Either they're required or they're not required.

Ken Andrews: Point of Order.

Chairman Clegg: State your Point of Order.

Ken Andrew: I don't believe there was a list of renovations given to us to vote on. There was some recommendations, there was some possibilities, there were some (inaudible). I think that if you remove the word 'the' as the one, two, three fourth word of that sentence, it would read better and more accurate.

Chairman Clegg: Except for the fact that the renovations that would be required would be subject to whatever the Code says that's required, except for those areas that are waived by the Fire Marshal in either Durham or the State. We don't get to sit here and say what parts of the Code, they're gonna . . . they're gonna bring forth.

Ken Andrews: I agree with you Mr. Chair. But rather than say 'the' renovations, which I don't believe were submitted to us, if we just say 'renovations' instead of 'the' renovations, I think its smoother and works much better.

Chairman Clegg: Ok.

(unidentified speaker): Point of Order.

Chairman Clegg: Ok.

(unidentified speaker): Is the assumption in the question that, the owner intends to keep these and use them in the same exact manner that he is currently using them?

Chairman Clegg: Well it would have to be based on the fact that we just allowed it to be classified I believe in the first vote, as a room and lodging. There was a 10 to 5

vote, so, in keeping with that, if you . . . the simple answer would be yes. It would be for current use, the existing use that is on the property now.

(unidentified speaker): Further clarification. Is that it may imply that he is required to make these . . . make these modifications even if he were to choose to reduce occupancies to only four of were to reuse them for some other use.

Chairman Clegg: I . . . I don't think so. Because the case before us is . . . is a building with five people that are leasing it. Is it or isn't it a rooming house, and if it is, is it grand-fathered, or is it required to do renovations to bring it up to the Code for rooming house. Joel.

Joel Fisher: I'm not sure we can say whether or not renovations are required or not required, because we don't know enough about the proposed renovations and we don't really know enough the technical issues.

Chairman Clegg: It's not up to us to decide whether or not . . . because part of the renovations are not. I'll phrase the questions that should the . . . the subject property be updated according to the Fire Code as a room and boarding house.

(unidentified speaker): According to the provisions of the Fire Code.

(unidentified speaker): I'm not understanding why there is a question about what is required from them. I believe it is pretty spelled out in a letter from the Fire Department requesting smokes and door closures and rated stairwells and windows, hinges . . . it was all in there.

(unidentified speaker): But we haven't reviewed the technical merits of the building. You know. (inaudible) to say whether or not their determination is accurate.

Chairman Clegg: But it is not up to us to do that. And its not the question before us.

(unidentified speaker): That's why . . . (inaudible-more than one speaking at one time)

(unidentified speaker): We're just asked to do what's in this letter right? As I understand it.

Chairman Clegg: No.

(unidentified speaker): No? Then I'm not understanding.

Chairman Clegg: The question before this body is . . . this question is really, is this facility grand-fathered or not.

(unidentified speaker): Correct.

Chairman Clegg: That's what this question is about. If its not grand-fathered, then it leaves this body as a room and boarding house, and it would be up to the State Fire Marshal as well as the local fire marshal to determine what will and will not be done. If the local fire marshal decides to waive a fire sprinkler system and the window changes, that's his duty. If he decides to require it all, and there is an appeal to the State Fire Marshal, and the State Fire Marshal says, forget the windows, and it stops there. Or unless the Durham Fire Marshal wants to come before us.

(unidentified speaker): Giving away a secret.

Chairman Clegg: What I am saying is we can't sit here and determine which ones.

(unidentified speaker): Ok.

Chairman Clegg: If you want, I'll make the question real simple.

(unidentified speaker): Grand-fathered.

Chairman Clegg: Is this facility grand-fathered from . . . from . . . from upgrading to the current Code as a rooming and boarding house. Is that a question you want to hear.

(unidentified speaker): No.

(unidentified speaker): No I don't even want to hear that one.

(unidentified speaker): Definitely not.

Chairman Clegg: Well its on the record now. So that's what we have . . . is it or isn't it grand-fathered?

(unidentified speaker): Point of Order. I think we've talked a number of times about what it takes to determine whether its grand-fathered or not. Imminent danger.

Chairman Clegg: I disagree. This body did not make that determination.

(unidentified speaker): That . . . that was what was read out of the Life Safety Code, I believe. Well, that's the way . . .

Chairman Clegg: I agree that in Life Safety Code there's something that says that even with grand-fathering, they can turn around and talk about imminent danger, and fight that. That's not up . . . that's not one of the questions at this Board of evidence appeal. It's a room and boarding house. Does it or doesn't it have to bring the facility up to the current Code?

Med Kopczynski: Why, just let them become grand-fathered.

Ken Andrews: Good point.

Chairman Clegg: It's on the record so . . .

Med Kopczynski. I know.

Chairman Clegg: But I'll . . . I'll ask that question. Are we ready?

(unidentified speaker): Point of Order. Will this be in addition to the text as written?
Will there be two questions, this and a following question?

Chairman Clegg: No.

(unidentified speaker): (inaudible)

Chairman Clegg: Jerry.

Jerry Tepe: Mr. Chairman, with all due respect, I think in my mind at least, the term imminent danger is very relevant in that case, because, as I stated earlier, the Code does specifically say that an existing building can continue in its current use regardless of whether it complies with the existing building requirements stipulated in the Code, unless 1.) a change of occupancy, or 2.) imminent danger is determined. And I will state for the record that I am inclined to vote yes on this but it is with the understanding that I believe the Fire Marshal has stipulated a case of imminent danger. And that without that stipulation, I would be voting in the opposite direction.

Chairman Clegg: I have a real problem with that unless you can point me in the direction of the testimony that proved that there was imminent danger as a basis of this. I heard no testimony about imminent danger today at all.

Jerry Tepe: I heard testimony about previous fires that was near death, to me that certainly constitutes imminent danger.

Chairman Clegg: I didn't hear about a near death fire at that facility. I heard about a fire that they were lucky that they all got out because they had disconnected the smoke detectors. But I heard of no imminent danger caused by the building itself.

(unidentified speaker): Imminent.

Chairman Clegg: I'll follow the will of this Body because I can tell you now, I will be filing a minority report. There is no doubt, I can not accept the logic that come through on some of these issues. It's my own personal opinion. Rick.

Rick Swain: I don't think we heard any real testimony of imminent danger. Nothing that defines it from any other structure in the community. I don't think you can classify 6 college students in a building as imminent danger, no matter what they do to your house on the weekend. I just don't think the . . .

Chairman Clegg: Personally, I'd rather have 6 college students living in my house than 2 drunks who smoke cigarettes.

Rick Swain: Right.

Chairman Clegg: And are married.

(unidentified speaker): (inaudible) college students (inaudible)

Chairman Clegg: (inaudible)

Rick Swain: I don't . . . I . . . I think that imminent danger is . . . I don't think that this is what . . . I mean, rebuilding a motorcycle in the living room, you know, and having 500 gallons of gasoline stored in the basement that to me would be imminent danger. But I just don't see just classifying a group of people that could potentially rent a building as . . . just because they go to college, as creating an imminent danger. We all have accepted . . . we all understand that there might be higher risks, but I don't that the risks are necessarily because, I think it has to do with their youth, and the fact that they're maybe not connected to the structure. But . . . I've . . . I've use to rent buildings, and I have people that weren't college students that . . . that . . . I would of rather had college students. I don't . . . I don't . . . I don't think that this anything we heard today justifies the statement of imminent danger. My own personal opinion.

Chairman Clegg: I am going to phrase the question as the Chair because we then have to take along with the roll call. I'm gonna ask the question. Do you believe that renovations updating the subject property are required? All those in favor say aye, umm raise your hand. I have 9. Those who don't believe that statement? 6. Ok. In my opinion that the results of all of those (inaudible) and questions the motion is to uphold the Fire Marshal's decision. Somebody want to make that motion?

(unidentified speaker): I'll make the motion.

Chairman Clegg: Motion made by George Maihos. Do you want to state your Motion?

George Maihos: I make a motion to uphold the Fire Marshal's decision based on the testimony and the results that we have today.

Chairman Clegg: Is there a second?

(unidentified speaker): I'll second.

Chairman Clegg: Seconded by Joel Fisher. I think we discussed it. Is there anymore discussion? Seeing none, roll call;

| | |
|----------------|-----|
| Tedd Evans | Aye |
| James Peterson | Aye |
| George Maihos | Aye |
| Joel Fisher | Aye |
| Ken Andrews | Yes |
| Med Kopczynski | No |
| Mike Santa | Yes |
| Tom Lambert | Yes |
| Rick Swain | No |
| Wes Golomb | No |
| Mark Weissflog | No |
| John Tuttle | Yes |
| Jerry Tepe | Yes |
| Tyler Carlisle | No |
| Chair votes | No |

Chairman Clegg: 6 nos and gotta be 9 yeses. **Motion passes 9 to 6.** Jerry are you interested in writing the ES version?

Jerry Tepe: If you are assigning it to me Mr. Chairman.

Chairman Clegg: Do I have any volunteers?

Med Kopczynski: Mr. Chairman, I would like to nominate Mr. Tepe.

Ken Andrews: Second.

Chairmen Clegg: Seconded. Jerry you're it. All those in favor of Jerry writing (inaudible).

Body: Aye.

Chairman Clegg: There was no opposition to that I can tell. I will write the opposing opinion. And I ask that all versions be sent to Evvy electronically. There will be a final vote at the next meeting which is in August. There is NO meeting in July. There will be another meeting to adopt or make sure that the (inaudible) as it comes out is acceptable to the Body, at least to the majority. I will do an opposing opinion, and anyone wants to sign a pen for.

Ken Andrews: I can't. Only because I'm not that politically knowledgeable . . . what is the difference between the way the majority/minority report comes down?

Chairman Clegg: Well, the majority report is the action of the Body. Which is . . . that's the decision of the Body. But, because of some of the reasons given for . . the majority opinion I will write, personally, why I disagree.

Ken Andrews: Does that become part of the permanent record? I guess is what . .

Chairmen Clegg: You betcha.

Ken Andrews: Ok. No. I just . . . I just wanted to know where that process itself Mr. Chair.

Chairmen Clegg: Its like being in the Supreme Court and being into writing a dissent (inaudible).

Jerry Tepe: Mr. Chair, Clarification. What time frame would you like that report submitted.

Chairman Clegg: If you can get it in within a week or so. Two weeks max. I understand that we are coming up on July 4th, but basically what we need to do is let . . give everybody a chance to look at it and see if they agree. What I'll ask is . . . is for Evvy to speed up the verbatim transcript, so that you can work off that as well. Then, we need to send it out so that everybody has a chance to look at it.

All right . . . if there's nothing else . . . meeting is adjourned.

(unidentified speaker): Marta has something.

Chairman Clegg: Marta.

Marta Modigliani: I have copies of the proposed Legislation that you had requested last time.

Chairman Clegg: Yea well we can wait till August. I have already adjourned.

Body: Awww come on. Give her a break.